

A

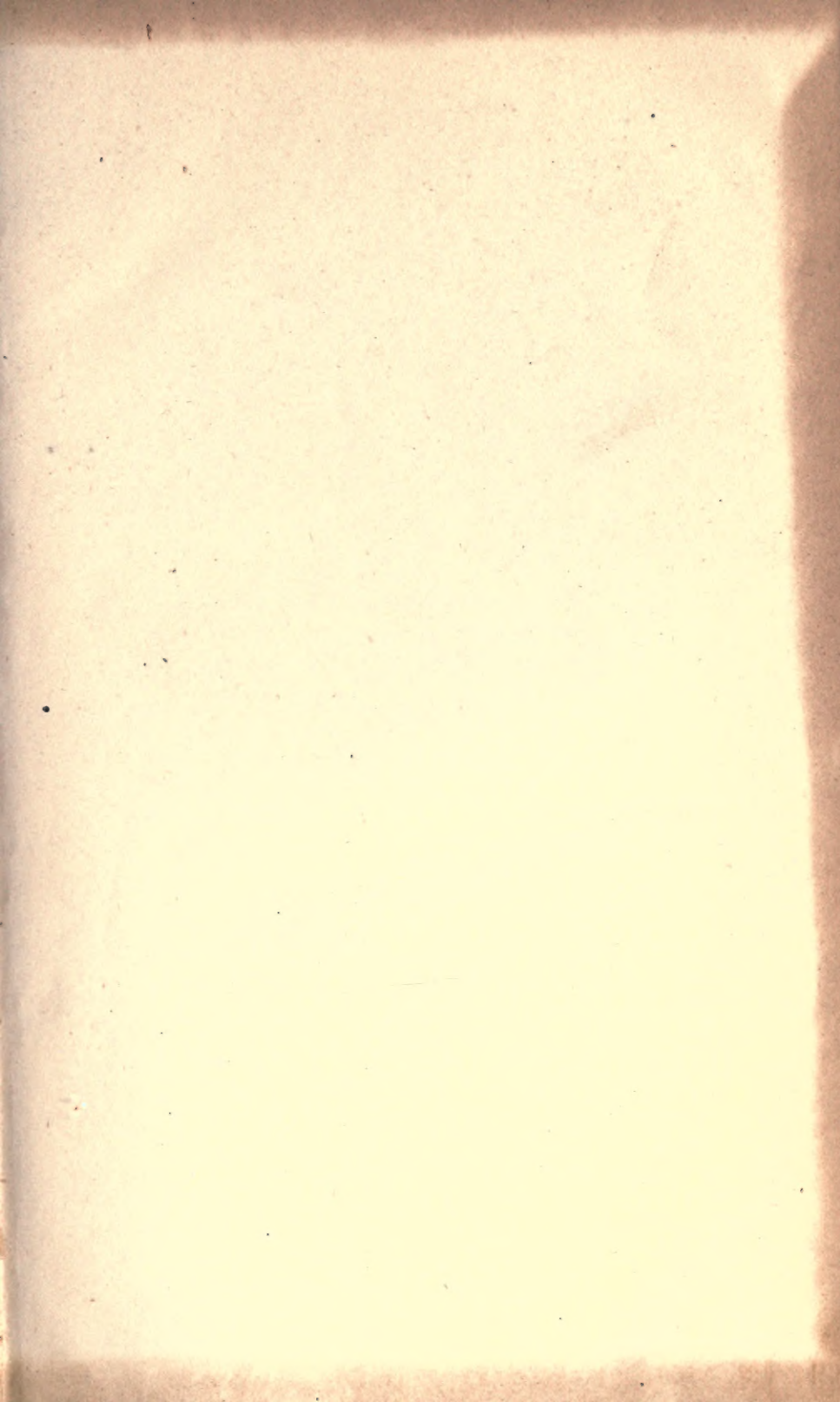
0  
0  
1  
0  
2  
8  
8  
3  
7  
1

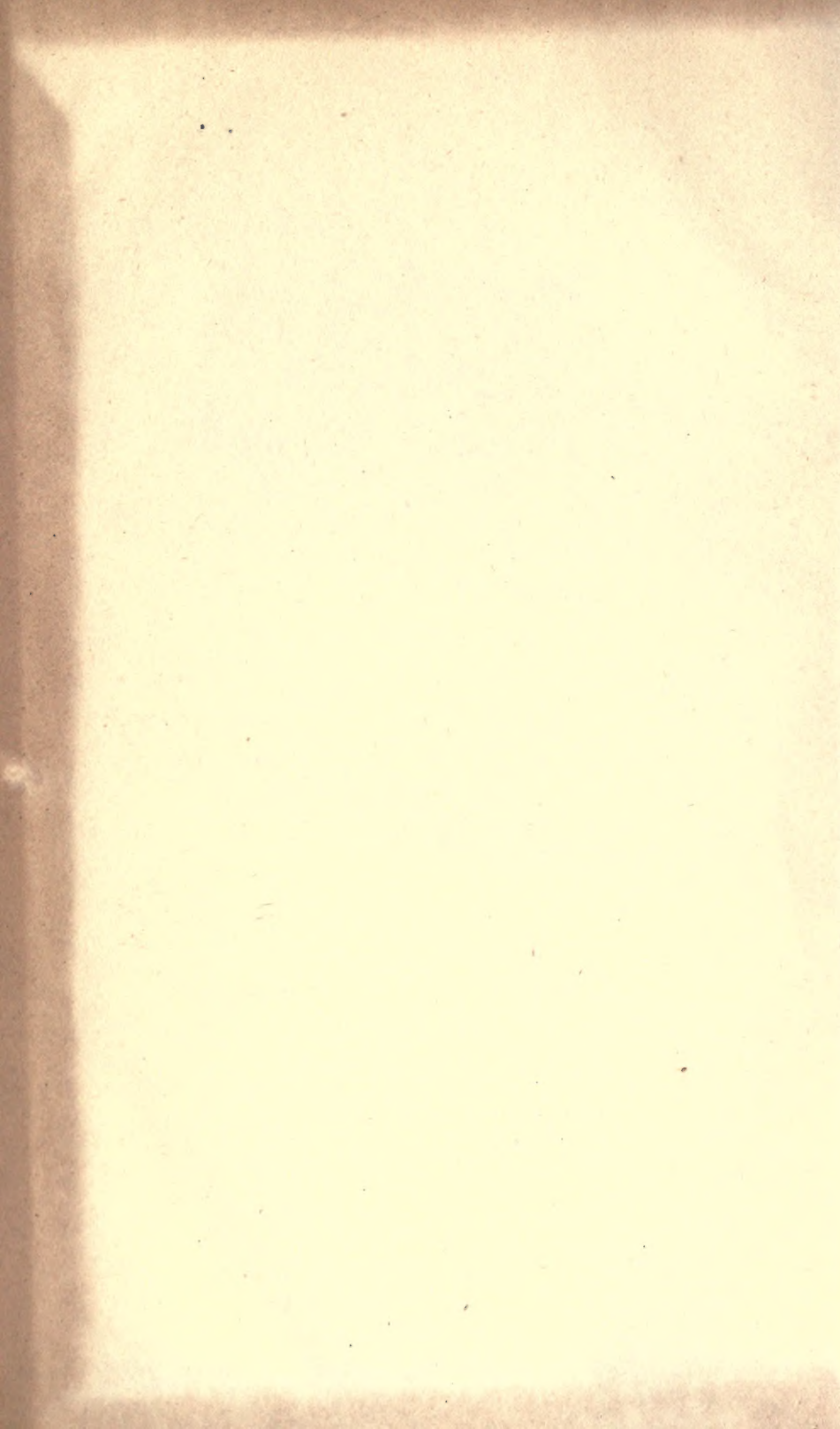


UP SOUTHERN REGIONAL LIBRARY FACILITY











NEW JERSEY COUNTY ESTATES

VOLUME 1

HANSON



Digitized by the Internet Archive  
in 2007 with funding from  
Microsoft Corporation



---

---

NEW JERSEY EQUITY REPORTS,

VOLUME V.

HALSTED, VOLUME I.

---

---

REPORTS OF THE

JUDGES OF THE

COURT OF CHANCERY

IN THE

INVESTIGATIVE COURT

OF THE STATE OF NEW JERSEY

COURT OF RECORDS AND APPEALS

NEW JERSEY EQUITY REPORTS

STATE OF NEW JERSEY

VOLUME V.

COMPILED VOLUME I.

NEW JERSEY

NEW JERSEY

NEW JERSEY

NEW JERSEY

NEW JERSEY

NEW JERSEY

NEW JERSEY



New Jersey, Reports, Court of Chancery

REPORTS OF CASES  
DETERMINED IN THE  
COURT OF CHANCERY,  
AND IN THE  
PREROGATIVE COURT,  
AND, ON APPEAL, IN THE  
COURT OF ERRORS AND APPEALS,  
OF THE  
STATE OF NEW JERSEY.

---

GEORGE B. HALSTED, Reporter.

---

VOLUME I.

SECOND EDITION.

WITH REFERENCES SHOWING WHERE THE CASES HAVE BEEN CITED, AFFIRMED, OVERRULED, QUESTIONED, LIMITED, ETC., DOWN TO PART I, VOL. XXXIX, N. J. LAW REPORTS (X VROOM), AND PART I, VOL. XXVIII, N. J. EQ. REPORTS (I STEW.), INCLUSIVE.

By John Linn, Esq., of the Hudson Co. Bar.

---

JERSEY CITY:  
FREDERICK D. LINN & CO.

1886.

F3c Lib

KFN

1848

.A2

v. 5



13712  
This Volume commences with the decisions in Chancery by the Chancellor appointed under the new constitution, adopted the 15th of August, 1844.

---

OLIVER SPENCER HALSTED,

CHANCELLOR.

Appointed February 5th, 1845.





# TABLE OF CASES REPORTED.

The letter v follows the name of the complainant.

A.		E.	
Abrahams, Robbins v.....	16, 51, 465	Edsall, Hamburg Manufacturing Company v.....	249
Adamson v. Ex'rs of Adamson....	349	Engle v. Haines.....	186
Albright, Van Scoten v.....	467		
Allen, Batton v.....	99		
Anderson v. Ex'rs of Hendrickson,	106		
B.		F.	
		Fisher's Ex'rs, Wilson v... ..	493
Baldwin, Mayne v.....	454		
Ballentine v. Ballentine.....	471, 519		
Batton v. Allen.....	99		
Bayles v. Staats.....	513		
Bell's Adm'r v. Hall.....	49, 477		
Blair v. M'Donnell.....	327		
Blydenburgh, Cotheal v.....	17, 631		
Brick, Getsinger v.....	391		
Brisley v. Jones.....	512		
Brittan, Chetwood v.....	628		
Brokaw, Ranyon v.....	340		
Brown, Washer v.....	81		
Bruce, Mann v.....	413		
Bullock v. Ex'r of Butcher.....	77		
C.		G.	
Campfield v. Johnson.....	245	Garr v. Hill.....	639
Cavalier's Ex'r v. Huffman.....	354	Geroe, Winter v.....	319, 655
Chegary v. Scofield.....	525	Getsinger, Brick v.....	391
Chetwood v. Brittan.....	628	Gifford, Westcott v.....	24
Colt, Kean v.....	365	Godwin, Mechanics' Bank of Pat-	
Commercial Bank v. Reckless,	430, 650	erson v.....	334
Cook's Ex'rs, Ware v.....	193	Green's Adm'r, Tucker v.....	380
Cooper v. Cooper.....	9		
Cooper's Ex'r v Cooper.....	498		
Corrigan v. The Trenton Dela-			
ware Falls Company.....	52, 232		
Cotheal v. Blydenburgh.....	17, 631		
D.		H.	
Daniels, Hatch v.....	14	Haines, Engle v.....	186
Degraw, Moore v.....	346	Haines, Ross v.....	632
Demarest, Lovett v.....	113	Hall, Bell's Adm'r v.....	49, 477
		Hamburg Manufacturing Com-	
		pny v. Edsall.....	249
		Hatch v. Daniels.....	14
		Hazen's Adm'rs v. Tillman's	
		Heirs and Devises.....	363
		Hendrickson's Ex'r, Anderson v..	106
		Hill, Garr v.....	639
		Holsman, Society for Useful Man-	
		ufactures v.....	126
		Hopper v. Sisco.....	343
		Huffman, Cavalier's Ex'r v.....	354
		Hulmes v. Thorpe.....	415
J.			
		Jolly's Will.....	456
		Johnson, Campfield v.....	245
		Johnson's Adm'rs, Williamson v.,	537
		Jones, Brisley v.....	512

<b>K.</b>		Reckless, Commercial Bank of	
Kean v. Colt and Society for Use- ful Manufactures.....	365	New Jersey v.....	430, 650
Kimball v. Morton.....	26	Redfield, Tappan v.....	339
Kipp, Soper v.....	383	Robbins v. Abrahams.....	16, 51
		Robbins, M'Knight v.....	229, 642
		Rockwell v. Lawrence.....	20
		Rogers' Ex'rs v. Rogers.....	32
		Rogers, Lunacy of.....	46
		Ross v. Haines.....	632
		Runyon v. Brokaw.....	340
		Ryerson, Pierson v.....	196
<b>L.</b>			
Lawrence, Rockwell v.....	20		
Longstreet v. Shipman.....	43		
Loomis, Smith v.....	60		
Lovett v. Demarest.....	113		
		<b>S.</b>	
		Scofield v. Chegary.....	525
		Seely v. Price.....	231
		Shipman, Longstreet v.....	43
		Sisco, Hopper v.....	343
		Small, Plume v.....	460, 650
		Smith v. Loomis.....	60
		Smith v. Smith's Ex'rs.....	484
		Society for Useful Manufactures, Holsman v.....	126
		Society for Useful Manufactures, Morris Canal and Banking Com- pany v.....	203
		Society for Useful Manufactures, Kean v.....	365
		Somerville Manufacturing Com- pany, Van Hook v.....	137, 633
		Soper v. Kipp.....	383
		Staats, Bayles v.....	513
		State, <i>ex relatione</i> Mayne, v. Bald- win.....	454
		Stevens' Adm'rs Williams v.....	119
		Stires v. Stires.....	224
		<b>T.</b>	
		Tappan v. Redfield.....	339
		Taylor v. Thomas.....	331
		Thorpe, Hulmes v.....	415
		Tillman's Heirs and Devises, Ha- zen's Adm'r v.....	363
		Trenton Delaware Falls Company, Corrigan v.....	52, 232
		Tucker v. Green's Adm'r.....	380
		<b>V.</b>	
		Vandyn's Ex'rs v. Vanness.....	485
		Van Hook v. The Somerville Manufacturing Company.....	137, 633
		Van Scoten v. Albright.....	467
<b>M.</b>			
Mann v. Bruce.....	413		
Mayne v. Baldwin.....	454		
M'Donnell, Blair v.....	327		
M'Knight v. Robbins.....	229		
Mechanics' Bank of Paterson v. Godwin.....	334		
Moore v. Degraw.....	346		
Moore's Adm'r v. Poland's Adm'r	517		
Moore's Ex'r v. Smith.....	649		
Morris Canal and Banking Com- pany v. Society for Useful Man- ufactures.....	203		
Morris Canal and Banking Com- pany, Warne v.....	410		
Morton, Kimball v.....	26		
		<b>N.</b>	
Newbold's Ex'rs, Peacock v.....	535		
		<b>O.</b>	
Obert v. Obert.....	397		
Olden's Ex'rs v. White.....	629		
		<b>P.</b>	
Paterson v. Paterson.....	389		
Peacock v. Newbold's Ex'rs.....	535		
Pierson v. Ryerson.....	196		
Plume v. Small.....	460, 650		
Poland's Adm'r, Moore's Adm'r v.	517		
Price, Seely v.....	231		
		<b>R.</b>	
Receivers of Mechanics' Bank of Paterson v. Godwin.....	334		



# TABLE OF CASES REPORTED.

vii

---

W.		Westcott v. Gifford .....	24
		White, Olden's Ex'rs v.....	629
Ware v. Cook's Ex'rs.....	193	Williams v. Stevens' Adm'r.....	119
Warne v. Morris Canal and Bank- ing Company .....	410	Williamson v. Johnson's Adm'rs,	537
Washer v. Brown.....	81	Wilson v. Fisher's Ex'rs.....	493
Webster's Administration Bond...	89	Winter v. Geroe.....	312, 655



# CASES

ADJUDGED IN

## THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY

APRIL TERM, 1845.

---

OLIVER S. HALSTED, CHANCELLOR.

---

WILLIAM M. COOPER AND OTHERS v. RALPH V. M. COOPER.

1. A general charge of abuse of trust is not sufficient ground for the interposition of the court to restrain an executor or other trustee from further interfering with the estate.

2. Facts showing such abuse should be made to appear. What facts not sufficient?

3. Where the legal and equitable estates are united in the same person, the equitable estate is merged in the legal.

4. A trustee, for the use of his children, of a tract of land called the Abbot tract, makes his will, by which, after giving particular parts of his real estate to his children respectively, he directs his executors to sell some of his lands, expressly excepting the Abbot tract from the power to sell, and then devises all the residue of his estate, real and personal, to his children. On the death of the testator, the legal estate in the Abbot tract vests in his children, the *cestuis que trust*.

5. When there is no charge in the bill, that a tract of timber land, from which the defendant is enjoined from cutting, belongs to the estate of which the



---

Cooper v. Cooper.

---

complainants are devisees, and the answer denies that the timber belongs to the estate, and avers that it belongs to the defendant, the injunction will be dissolved.

The bill in this case was filed on the twenty-eighth of January, eighteen hundred and forty-five, by devisees under the will of Benjamin B. Cooper, deceased, against the defendant, as an executor of and trustee under the will, for an account, and for an injunction restraining him from any further exercise of power as executor or trustee, and from cutting timber on the lands of the estate. The injunction was granted as prayed for. The defendant filed his answer, and thereupon moved to dissolve the injunction. The facts will sufficiently appear in the opinion of the court.

*W. Halsted*, in support of the motion.

*Jeffers, contra.*

THE CHANCELLOR. The first branch of the injunction restrains the defendant from any further exercise of power as executor of or trustee under the will, and from collecting or receiving any money due to the estate of the testator. The charges in the bill under which the injunction in this respect was granted, are, that the will was proved in April, eighteen hundred and thirty-five; that the defendant immediately possessed himself of nearly all the personal estate of the testator, amounting by the appraisement to about twenty thousand dollars; that in eighteen hundred and thirty-eight he failed, and applied for the benefit of the insolvent laws, and that in that year all his property, real and personal, was sold by the sheriff of Gloucester county; that in eighteen hundred and forty-two he applied for the benefit of the bankrupt law, and was discharged as a bankrupt; that he has not settled any account, as such executor, in the Orphans' Court of the county of Gloucester, nor any account with his co-executors; that he has in his hands funds of the estate to the amount, as the complainants believe, of fifteen thousand dollars; and that debts against the estate, to the amount of several thousand dollars, remain unpaid. There is then a charge, in general language, that he has grossly abused

---

Cooper v. Cooper.

---

his trust as executor and trustee, not only by the commission of waste of the real estate and by squandering the personal estate, but by gross mismanagement and the want of common prudence.

The answer states that the defendant received but about five thousand dollars of the personal property appraised, except about two thousand one hundred dollars of trust funds held by the testator for other persons, which were appraised as part of the personal estate; admits his failure in eighteen hundred and thirty-eight, and the sale of his property by the sheriff in that year, and his discharge as a bankrupt in eighteen hundred and forty-two, and that he has not settled any account as executor, either in the Orphans' Court or with his co-executors, but states that he is ready to settle his accounts, and that he had given notice, some time before the filing of the complainants' bill, of his intention to settle his accounts as executor, in the Orphans' Court of the county of Gloucester. The answer denies that he has funds of the estate in his hands to any amount, and states that the estate is indebted to him for moneys advanced by him for the estate, over and above the assets received by him, and denies that he has abused his trust, in the same general language used in the bill charging an abuse of trust.

It is within the jurisdiction of this court to restrain an executor or other trustee who abuses his trust, from further interfering with the estate. But a general charge of abuse of trust is not sufficient ground for the interposition of the court: facts showing such abuse should be made to appear.

That ten years have elapsed since the death of the testator, and that the executor has not settled his account in the Orphans' Court, is not sufficient.

Nor will the additional facts that, in the meantime, the executor failed in his individual business, and that, three years before the bill filed, he was discharged as a bankrupt, make a case for the interposition of the court by injunction.

In the case before us, the answer denies any abuse of trust. In reference, therefore, to so much of the injunction as restrains the defendant from any further exercise of power as executor or trustee under the said will, and from collecting or receiving any money due to the estate of the testator, it will not be retained.

---

Cooper v. Cooper.

---

The special object of the injunction, no doubt, was to restrain the defendant from cutting timber on the lands of the estate, or causing it to be cut.

He admits in his answer, that he had advertised for sale the timber on two hundred and fifty acres of the Abbot tract, and states that there is a balance now due for taxes on the lands in this state, of sixty-five dollars, and that there are taxes now due on the lands in Pennsylvania, amounting to twelve hundred dollars, and that the proceeds of the sale of the two hundred and fifty acres of timber, will not be more than sufficient to pay the taxes now due, and that it is his intention to appropriate the proceeds of such sale to the payment of the taxes against the estate of the testator.

In reference to this tract, I am at a loss to understand, from the bill and answer, how the defendant claims to exercise any power or authority in respect to it. We are told, by both bill and answer, that the testator held this tract in trust for his children, and neither the bill nor the answer shows that this trust devolved on the defendant. The testator was *sole* trustee of this Abbot tract, for the use of his children. He made a will, by which, after giving particular parts of his real estate to his children respectively, he directs his executors to sell some of his lands, expressly excepting the Abbot tract from the power to sell, and then devises all the residue of his estate, real and personal to his children, of whom the defendant is one.

We are under no necessity, in this case, of examining the question whether general words in a devise will pass a trust estate, *i. e.*, the estate of the trustee. [The words "trust estate" seem to be used with some confusion in the books—sometimes to express the estate of the trustee, and sometimes that of the *cestui que trust*.]

The rule formerly was, as it seems, that general words would not pass a trust estate, unless there appeared to be an intention that it should pass. This was said to be the rule, by Lord Rosslyn, in 1800, though he said that perhaps the reverse would have been the more convenient rule, as it might be easier to find a devisee than an heir. In a subsequent case, the master of the rolls held that a trust estate would pass by a general devise, unless an intention to the contrary could be inferred from the



---

Cooper v. Cooper.

---

words of the will, or objects of the testator; and Lord Eldon said he did not feel strong enough, upon authority or reasoning, to dissent from the decision of the master. But in the case in hand, *quacunqve via data*, the result is the same. If the legal estate of the testator as trustee for his children, passed by the devise, then the legal and equitable estates became united in the children. If the legal estate did not pass by the devise, it descended to his heirs-at-law, his children, the *cestuis que trust*. In either case, the legal and equitable estates are united in the same persons, and the equitable estate merged in the legal estate.

The Abbot tract, then, on the death of the testator, vested in his children as their own property; it was not subject to his debts.

The interest of Ralph V. M. Cooper in this tract passed to his assignee on his discharge as an insolvent, if he was so discharged; if not, it passed to his assignee in bankruptcy. He has, therefore, now no interest in this Abbot tract in his own right, nor any power in reference to it, or the timber on it, as an executor of the said will.

There seems to have been some misapprehension in the solicitor who drew the bill, as to the provisions of the will in respect to the Abbot tract. The bill states that the executors of the said will have power to sell timber from said tract, from time to time, for the payment of taxes, and that under pretence of power under the said will, the said Ralph had advertised the timber on two hundred and fifty acres of the said Abbot tract, which sale is not necessary for the payment of taxes. But the will contains no such power.

If, as is before shown, the defendant Ralph has no interest in this Abbot tract, nor any power or authority in respect to it, as executor, it may be said that the threatened cutting would be a mere trespass, and that this court should not interfere. This might have made some difficulty as to the granting the injunction, if the case had been presented in this light by the bill. But it is evident that both parties have been under a misapprehension as to the position in which the executors stood in reference to this tract; and inasmuch as the executor supposes, and insists by his answer, that he has a right to cut timber

---

Hatch v. Daniels.

---

from this tract, to pay the taxes on lands in Pennsylvania, and on lands of the testator in this state, and on that ground moves to dissolve the injunction; the court must deny the motion. In reference to the Abbot tract, therefore, the injunction is retained.

As to the twenty-five acres, the answer admits that the defendant advertised for sale the timber on twenty-five acres in the county of Camden, as charged in the bill; but says that the timber so advertised is his own property, and does not belong to the estate of the testator; and there is no charge or statement in the bill that this twenty-five acres does belong to the estate. As to this tract, therefore, the injunction must be dissolved.

Order accordingly.

---

AROET M. HATCH v. DAVID DANIELS.

On the positive denial of the allegations of the bill on which the complainant rests his equity, an injunction will be dissolved.

The bill in this case states that in eighteen hundred and thirty-nine, the complainant and Lewis M. Hatch and Daniel F. Fleming were partners in trade in New York, under the name and style of A. M. Hatch and Company. That said firm became embarrassed, and was subsequently dissolved, having, before the dissolution, become indebted to the defendant, David Daniels, for goods furnished them by him, for part of which they gave to said defendant their partnership notes, the other part of said indebtedness remaining in the shape of book account against them.

The bill then charges that Fleming, one of the said firm, on a fair adjustment of accounts with the complainant, would, as the complainant believes, be much indebted to him, but that he had left New York and gone to reside at Charleston, South Carolina; "and that complainant has reason to believe, and does believe, and therefore charges, that Fleming has either paid off the said notes of the said firm of A. M. Hatch and Company to Daniels, or made some arrangement respecting the

---

Hatch v. Daniels.

---

same, and respecting the said book account of Daniels, by which the same constitute no valid or legal claim in favor of the said Daniels against the complainant, or the said firm of A. M. Hatch and Company; and that the object is to recover the amount thereof from the complainant, in the name of the said Daniels, but for the use and benefit, wrongfully, of the said Fleming."

The bill prays a discovery, to enable the complainant to make defence in an action at law brought in the name of Daniels on the said notes and book account, "and that the said Daniels may answer what arrangement exists between him and Fleming (if any) respecting said notes and account; whether the same now belong to him, or did belong to him at the time of commencing said action and at this time;" and whether he is not lending his name for the prosecution of the same, for the benefit of Fleming; and that Daniels may be enjoined from further prosecuting the said action at law, and that said notes may be given up to be canceled, and the said account receipted and discharged, and for further relief.

On this bill an injunction was granted to restrain the said suit at law, which was noticed for trial on the third Tuesday of October, eighteen hundred and forty-four.

The answer positively denies the existence of the alleged facts of which a discovery is prayed, and on the supposed existence of which the injunction was granted.

*Hubbell* moved to dissolve the injunction.

*W. Pennington, contra.*

**THE CHANCELLOR.** The general rule is, that on the positive denial of the allegations of the bill on which the complainant rests his equity, an injunction will be dissolved. There is nothing in this case to induce the court to retain the injunction. The injunction will be dissolved.

Order accordingly.



---

Robbins v. Abrahams.

---

JOHN ROBBINS v. GEORGE D. ABRAHAMS AND HIS WIFE,  
AND JAMES BURROWS, TRUSTEE OF THE WIFE.

The joint and several answer of a married woman and her trustee, to a bill against her trustee, her husband and herself, put in without leave of the court, may be suppressed for irregularity.

---

In this case, the joint and several answer of Phebe Abrahams, wife of George D. Abrahams, and of her trustee, James Burrows, had been put in without the leave or order of the court. The husband had not answered.

*C. S. Green* moved to suppress the answer, and cited *Story's Eq. Pl.*, § 71; *Mitford's Pl.* 105; 1 *John. Ch. R.* 24, and other authorities.

*P. D. Vroom, contra*, admitted the general rule, but submitted whether, the trustee having joined in the answer, it should be wholly suppressed.

THE CHANCELLOR. A wife cannot answer separately from her husband, without leave of the court. The answer will be suppressed, and the defendants will be ordered to answer by the first day of the next term.

Motion granted, and order accordingly.

CITED in *Collard v. Smith*, 2 *Beas.* 45; *Vanderveer v. Holcomb*, 8 *C. E. Gr.* 558.

# CASES IN CHANCERY.

JUNE TERM, 1845.

---

HENRY COTHEAL AND DAVID COTHEAL v. JEREMIAH W.  
BLYDENBURGH ET AL.

1. A, living in New York, sells to B, also living in New York, a tract of land in New Jersey, and takes his bond for part of the consideration money, with seven per cent. interest, and his mortgage on the lands conveyed, to secure the payment of the bond. The mortgage is not usurious.

2. The exchange of the papers in New Jersey, at the proper record office, will not make the mortgage usurious; they having been executed and acknowledged in New York, and a sufficient reason for not exchanging them there being shown.

---

This was a bill for the foreclosure of a mortgage. The complainants had sold to J. W. Blydenburgh, a tract of land in this state, and taken his bond for a part of the consideration money, with seven per cent. interest, and his mortgage on the lands sold to secure the payment of the bond.

Both parties resided in New York, and the papers were executed and acknowledged there, but were exchanged in this state, at the clerk's office of the county in which the lands are situated.

A mortgage on the same lands, from Blydenburgh to Wadsworth, a witness in the cause, was executed and acknowledged in New York, at or about the time when the mortgage to the complainants was executed and acknowledged.

Wadsworth testified that he met Blydenburgh at the complainant's office in New York, a few days after the mortgages were acknowledged, for the purpose of having the mortgages delivered, and of Blydenburgh's getting his deed. That at this

---

Cotheal v. Blydenburgh.

---

time, there was a proposition made as to the exchange and delivery of the papers. That one of the complainants objected to delivering the deed, unless he could be sure that the mortgage to them was put on record before the mortgage to the witness. That he was present at a subsequent interview between the same parties, or some of them, in relation to the same subject, at the office of Mr. Feltus, a counselor-at-law in New York, who acted as counsel for the complainants; and that at this interview it was understood that Blydenburgh and one of the complainants should meet, with their papers, at the place of record in New Jersey, the next day, for the purpose of having the papers recorded in the proper order. That it was agreed that the witness' mortgage should be second.

The defence set up by the answer is, that the mortgage was usurious.

The cause was heard on the pleadings and proofs.

*Leupp*, for the complainants, cited 17 *Johns. Rep.* 511; 1 *Green's Ch. R.* 44; 1 *P. W.* 606; 3 *Green's Rep.* 328; 2 *Kent's Com.* 460, 461.

*J. W. Blydenburgh*, *pro seipso*, cited 8 *Leigh's Virg. Rep.* 93; 3 *Iredell* 528; 6 *Paige* 627; 4 *Peters* 205.

THE CHANCELLOR. This is not the case of a borrower and lender residing in New Jersey, making a contract for the loan of money, and going into New York to exchange the papers, and reserving seven per cent. interest. All the parties to this contract resided in New York at the time it was made. The bond and mortgage both truly state the parties, obligor and obligees, and mortgagor and mortgagees, as of the city of New York. The papers were executed in New York; the mortgage is acknowledged in New York. It is clearly a New York transaction.

A, residing in New York, lends B, also residing in New York, a sum of money, and takes his bond for it, payable in one year, at New York interest, seven per cent. To secure the bond, the borrower gives the lender a mortgage on lands in New Jersey. It would be a singular application of the *lex loci*



---

Cotheal v. Blydenburgh.

---

*rei sitæ*, to say that, because this New York contract is secured by a mortgage on lands in New Jersey, where the legal interest is six per cent. only, it is void for usury, or even to say that the lender shall receive only New Jersey interest. 3 *Atk.* 727, *Stapleton v. Conway*.

Another ground relied on by the defendant was, that the bond and mortgage, though executed, witnessed, and acknowledged in New York, were actually delivered at the clerk's office in New Brunswick, New Jersey, and not in New York. I do not see that the mere fact of the exchange of the papers in some place out of New York deprives it of the character of a New York contract. But in this case, the reason why it was done is manifest. It was done by arrangement between the parties, and by the advice of the complainants' counsel, in order that the complainants might be sure that their mortgage found its right place on the record.

As to the rate of interest in New York, it is sufficiently proved in the case, if it were necessary to prove it. But it was not necessary. The defence is usury, by the law of New Jersey. This defence cannot be made in relation to a New York contract.

The defence is overcome by showing that this was a contract not subject to the New Jersey statute. If the contract was usurious in New York, it was for the defendant to show it, in pleading and proof.

The complainants are entitled to the relief sought by their bill. The usual reference will be ordered.

Order accordingly.

AFFIRMED, 1 *Hal. Ch.* 631.

CITED in *Dolman v. Cook*, 1 *McCar.* 62; *Campion v. Kille*, 2 *McCar.* 231; *Andrews v. Torrey*, 2 *McCar.* 357; *Atwater v. Walker*, 1 *C. E. Gr.* 43; *Leake v. Bergen*, 12 *C. E. Gr.* 361.

---

Rockwell v. Lawrence.

---

## REUBEN ROCKWELL AND AZARIAH LEE v. JAMES S. LAWRENCE ET AL.

On bill for the specific performance of an alleged agreement for the sale of land to the complainant, an injunction was issued to restrain a subsequent purchaser from proceeding in an ejectment to recover possession from the complainant. The injunction may be dissolved, on the answer of the defendant who is alleged to have made the agreement to sell, denying the agreement, and the answer of the subsequent purchaser, denying any knowledge, information, or belief of such alleged agreement.

---

This bill, filed November fifteenth, eighteen hundred and forty-four, is a bill for the specific performance of an alleged contract between Reuben Rockwell and Azariah Lee, the complainants, and James S. Lawrence, for the sale by Lawrence, and the purchase by the complainants, of a tract of pine timber land in Monmouth county, called the Greenwood tract.

The bill states that, on the twenty-third of September, eighteen hundred and forty-three, Charles Stewart and his wife sold and conveyed this tract, with others, to John Read. That, at the time of the delivery of the deed from Stewart to Read, the said Read, with the complainant Rockwell under him, was in possession of the land, under an agreement for the purchase thereof from Stewart; and that, ever since the delivery of the said deed, Read, and one of the complainants under him, had continued in possession, up to the time of the making of the contract stated in the bill. That Stewart and wife, before conveying to Read, had given a mortgage to one McKnight on the Greenwood tract, for fifteen hundred dollars; and that, under a decree of this court for the foreclosure of the said mortgage and the sale of the said tract, it had been sold by the sheriff of the county of Monmouth to the said James S. Lawrence, on or about July the fourth, eighteen hundred and forty-three. The bill then sets out what is claimed to be the agreement, the specific performance of which is sought by the bill; and states that, in pursuance of the said agreement, the complainants went into possession of the tract, and commenced cutting and coaling for the spring sales, &c.

---

Rockwell v. Lawrence.

---

It is not necessary, on this motion, to state more fully the charges in the bill on which the prayer for specific performance is founded.

After the alleged contract, the premises were sold and conveyed by the defendant Lawrence, to the defendant George Cornelius. The bill alleges that Cornelius had notice of the contract. Cornelius had brought ejectment to recover possession of the premises, and the bill prayed an injunction to restrain him from proceeding in that suit. The injunction was granted.

The defendants put in their joint and several answer. They deny that any such agreement as is set forth in the bill, either in form or substance, was ever made, and deny that the complainants went into possession under any such agreement. Lawrence says that he bought the Greenwood tract in behalf of himself and the defendant Wyckoff, and so informed the complainants, at the interview of February first, eighteen hundred and forty-four, stated in the bill—being the interview at which the complainants charge that an agreement for the purchase and sale of the tract was made.

The answer states that the agreement under which the defendants went on to the tract and commenced cutting, was an agreement that they might go on the tract, and cut and coal until some time in the early part of the season, and take the coal to market, and pay over one-fourth of the proceeds, as the complainants proposed doing in case they should buy the tract, and that if, on such trial, the complainants should coal and take to market as much per week as they proposed, viz., two thousand bushels, and realize twenty cents a tub, and pay over, on the sale of each cargo, commencing about April the first, thereafter, one-fourth of the price of the coal, to Lawrence and Wyckoff, and should satisfy them that they would be able to pay for the tracts in the manner they proposed, in case they should buy, that then the defendants Lawrence and Wyckoff, on being so satisfied, would enter into a contract to sell to the complainants the Greenwood tract for five thousand dollars, and another tract, called the Fanago tract, for three thousand dollars, but that if, on such trial, the complainants should fail



---

Rockwell v. Lawrence.

---

in any of the above particulars, or if, for any cause, the contract for sale should not be entered into, then the complainants were to pay to Lawrence and Wyckoff a fair compensation for the wood and timber they should take away, and yield up possession of the premises. And Lawrence says that the complainants were willing, in case the contract for sale should be finally entered into, to give eight thousand dollars for the two tracts, but were not willing to give more than four thousand dollars for the Greenwood tract alone, which he, Lawrence, refused to take, and that they never came to any agreement whether the Greenwood tract should be at the price of four thousand or five thousand dollars, and that the only conclusion they came to was as above stated.

The answer states that the authority given to the complainants to go to cutting for the spring sales, was, under this agreement, set forth in the answer, and that the complainants commenced cutting under this agreement, and took coal to New York until about May twenty-second, eighteen hundred and forty-four, yet had never accounted for the proceeds, or paid any part of the same, as, by the terms of their agreement, they were bound to do. That they were not able to coal one thousand tubs a week, nor had they taken that quantity to New York. That at this time it had become manifest that the complainants could not comply with their contract, as stated in the answer, nor with the contract, if it had been as stated in the bill.

That Lawrence then stated to Rockwell that it was apparent the complainants could not fulfill the contract of sale if they entered into it. That at Rockwell's request, Lawrence consented to afford the complainants another trial, to see whether, if the contract of sale should be finally entered into, there was any prospect of their being able to pay for the lands, according to their proposals, as stated in the answer. That this second trial was given on the express understanding with the complainants, that if they failed, the whole matter, as far as the sale was concerned, should be at an end, and the complainants should pay the fair value of the wood and timber cut.

That the complainants continued cutting until November, eighteen hundred and forty-four, when they were stopped by a



---

Rockwell v. Lawrence.

---

rule of the Supreme Court to stay waste, made in the ejectment suit ; but that they never accounted for each cargo of coal as it was sold, or at any other time, and never paid over any part of the proceeds, except as stated in the two receipts mentioned, &c.

It is not necessary to state more of the answer for the purpose of disposing of the present motion.

On this answer the defendants, by their counsel, moved to dissolve the injunction.

*W. L. Dayton*, in support of the motion.

*Ryall and P. D. Vroom, contra.*

Cases cited against the motion, 2 *John. Ch. R.* 202, 148 ; 3 *Ib.* 345 ; 1 *Green's Ch. R.* 40, 438.

THE CHANCELLOR. As to the question of notice to Cornelius, there is no difficulty in the case. If, as between the complainants and Lawrence, there was a contract of sale and purchase, there is enough in the bill and answer to charge Cornelius with notice. The inquiry is, does it sufficiently appear from the bill and answer, that there was any such contract as is set out in the bill ? Lawrence and Wyckoff positively and fully deny it, and state what the agreement was, under which the complainants went to cutting. But it is said by the counsel for the complainants that, as the injunction is against Cornelius alone, it must stand or fall by his answer, and that he cannot call to his aid the answer of the other defendants ; that, if he has no knowledge of the facts, and cannot deny the charges of the bill, the injunction must stand. This ground cannot be maintained. It is a bill for the specific performance of an alleged agreement between the complainants and Lawrence. The injunction against Cornelius, the subsequent purchaser from Lawrence, is only auxiliary to the relief sought by the bill. Lawrence denies the equity of the bill, and the facts from which it is supposed to arise ; and Cornelius denies any knowledge, information, or belief of the alleged agreement. Should the injunction be retained because the subse-

---

Westcott v. Gifford.

---

quent purchaser, knowing nothing of the facts, can neither admit nor deny them? I think not. The injunction will be dissolved.

Order accordingly

---

**WILLIAM WESTCOTT v. GIFFORD AND COSSABOOM.**

If, on examining the complainant's claim of title to timber land, from which the defendant has been restrained from cutting timber, the court is clearly satisfied that the complainant has no title, the injunction will not be retained, though an action of trespass for cutting be pending at law, but will be dissolved.

---

On the thirty-first of July, eighteen hundred and forty-four, William Westcott, with other complainants, exhibited his bill, setting up title to a tract of cedar swamp in Egg Harbor. Westcott claimed as heir-at-law of his father, Blazier Westcott; deducing his title from surveys made in August, seventeen hundred and thirty-nine, and February, seventeen hundred and forty-one. The bill stated that the defendants were cutting timber on the premises, and were irresponsible, and that an action of trespass for the cutting had been brought in the Supreme Court, and prayed an injunction.

Injunction was granted on the ninth of August, eighteen hundred and forty-four.

The defendants presented their petition to the court, stating that they and those under whom they claim, had been in possession of the premises for nearly a century, and that the complainants were engaged in cutting timber on the premises, and were insolvent, and praying that the complainants might be enjoined from cutting. This injunction was also granted.

On the twenty-eighth of August, eighteen hundred and forty-four, the defendants put in their answer to the bill; and the injunction obtained by the complainants was dissolved in October, eighteen hundred and forty-four.

In November, eighteen hundred and forty-four, Westcott filed a new bill, stating that, since the filing of the first bill, he

---

Westcott v. Gifford.

---

had discovered that his father had no title to the premises, and setting up a title under George West, deducing title to George West, from ancient surveys. On this bill, an injunction was granted November twelfth, eighteen hundred and forty-four, so that both parties were again enjoined from cutting.

To this bill, an answer was put in, and the parties were heard on cross-motions, each party moving to dissolve the injunction obtained by the other.

*Sloan and Browning*, for the complainant.

*W. Potts and Jeffers*, for the defendants.

The Chancellor, after an elaborate examination of the title deeds exhibited, which it would be unprofitable to report, said he was satisfied there was nothing in the show of title made by the complainant; that his own exhibits disproved his title, and that the injunction obtained by the complainant would, therefore, be dissolved, notwithstanding the pendency of his action at law for the cutting.

The injunction obtained by the complainant was dissolved, and that obtained by the defendants was retained.

It was said by the Chancellor, in this case, that an order may be obtained to prove deeds, *vivá voce*, at the hearing, saving all just exceptions, and that, on due service of a copy of such order, such proof may be made at the hearing; that a deed which requires nothing more than proof of handwriting, may be so proved. 1 *Smith's Ch. Pr.* 44.

VOL. I.

B



---

Kimball v. Morton.

---

HARRISON KIMBALL AND WILLIAM A. DOLE v. PETER  
MORTON ET AL.

1. Courts of equity will not, in general, decree performance of contracts for the sale of personal property, but will decree the execution of trusts of personality.

2. Stock in a bank had been transferred to the defendant, to be by him transferred in different portions, one portion of which was to be transferred to the complainants. A transfer decreed.

3. The statute of frauds, requiring declarations of trust to be in writing, does not extend to trusts of personality.

---

The bill states that Charles Collins, being indebted to the complainants, Harrison Kimball and William A. Dole, did, on the thirtieth of September, eighteen hundred and forty-one, by writing under seal, execute to one Chase, agent of the complainants, an assignment of three hundred and eighty-eight shares of the stock of the People's Bank of Paterson, standing in his name on the books of the bank, as collateral security for the payment of certain notes held by the complainants against him, and in trust, after paying said notes and all expenses, to pay over the surplus to him, Collins, or his assigns, empowering the complainants to ask and receive transfers of the stock to them, and to make transfers thereof, or any part thereof, to themselves or any other persons, and to sell the stock, or any part of it, at not less than seventy-five cents to the dollar, revoking all former powers of attorney given in reference to this stock. That the defendant Peter Morton then held a power of attorney, before then executed by Collins, authorizing him to sell and transfer the stock. That Morton claimed to have received and to hold the power of attorney to him, as security for money alleged to be due him from Collins. That before that time, an attachment had been issued in New Jersey against Collins, at the suit of Perkins, Hopkins, and White, on which the stock was attached, and was then pending undetermined. That, for the purpose of settling the claims and rights of the parties to the stock, and adjusting their respective interests in it, it was agreed, by and between Collins, Morton, Perkins,



---

Kimball v. Morton.

---

Hopkins and White, and the complainants' said agent, that three hundred and seventy-eight shares should be transferred to Morton, and that he should retain to himself, in satisfaction of his demand against Collins, two hundred and fifty shares thereof, and should immediately assign to Perkins, Hopkins and White forty-eight shares thereof, and to the complainants' said agent the remaining eighty shares thereof. That in pursuance of this agreement, three hundred and seventy-eight shares were, on the second of October, eighteen hundred and forty-one, transferred on the books of the bank to Morton, and that on the ninth of November, eighteen hundred and forty-one, a certificate of such transfer was delivered to Morton, for the purposes before mentioned. That shortly afterwards, Chase requested Morton to assign to him the eighty shares for the benefit of the complainants, in pursuance of the said agreement; but that Morton refused, alleging that there were attachments in New York against Collins, and that he, Morton, might make himself liable.

The bill charges that no attachment had been issued in New York, except one in which Morton was plaintiff; and submits that such attachment in New York constitutes no lien on the stock, and did not hinder Morton from complying with the said agreement.

The bill states that the defendant Edward Filly, after the making of the said agreement, and before the term of February, eighteen hundred and forty-two, of the Passaic Circuit Court, caused an attachment to be issued out of said court, in his name, against Collins, by virtue of which three hundred and thirty shares of the said stock, standing on the books of the bank in the name of Morton, were attached as the property of Collins. That these three hundred and thirty shares included the eighty shares so agreed to be transferred by Morton to the complainants' agent. That in July, eighteen hundred and forty-two, judgment in the last-mentioned attachment was entered in favor of Filly, for thirteen hundred and nine dollars, and that the auditors were ordered to sell the property attached, and did sell to Filly, for fifty dollars, seventy-nine shares of the said stock, the same being intended to be, as the complainants are informed and believe, seventy-nine of the eighty

---

Kimball v. Morton.

---

shares so agreed to be transferred by Morton to the complainants' agent.

The bill charges that the last-mentioned attachment was contrived by collusion and fraud between Morton and Filly, for the purpose of defrauding the complainants of the seventy-nine shares; that the note on which the attachment was issued was furnished by Morton to Filly, and was fraudulently put in circulation, nothing being due on it from Collins. That Morton pretends he is required by an order of the Circuit Court of Passaic, to transfer the said eighty shares to Filly, in pursuance of said auditors' sale, and has fixed on the eighth of October, eighteen hundred and forty-two, to make such transfer.

The bill prays that Morton may be enjoined from making the transfer, and that the bank may be restrained from permitting it to be made; that Morton may be decreed to perform the said agreement, and transfer the said eighty shares to the complainants or their said agent, or that a transfer may be decreed to be made by a master, or by such person as the court shall appoint for that purpose; that the bank may be decreed to permit such transfer to be made on their books; and that Morton may be decreed to pay to the complainants what he has received for dividends on the said eighty shares since the making of the said agreement.

An injunction was issued, according to the prayer of the bill.

A decree *pro confesso* was made against Filly and the bank.

Morton answered the bill. The substance of the answer will sufficiently appear in the opinion of the court. The cause was brought to a hearing on the pleadings and proofs.

A. Whitehead, for the complainants.

A. S. Pennington, for the defendants.

Cases cited on the part of the defendants: 15 *Wend.* 373; *Phil. Evid.* 439; 1 *P. Wms.* 570; 2 *Ibid.* 305; 12 *Ves., Jr.*, 321; *Story's Eq. Jur.*, § 29; *Bunb. Rep.* 135; 10 *Ves., Jr.*, 159; 13 *Ibid.* 37; 3 *Atk.* 383; 5 *Vin. Ab.* 450.

THE CHANCELLOR. One objection made on the argument to the granting the relief sought by this bill was, that it is a bill for the specific performance of an agreement in relation to personalty. From the view I have taken of the case, it is not necessary to go at large into the learning on this subject; though much was said at the hearing, on both sides, in reference to the doctrine of equity as to the specific performance of such agreements. Courts of equity, will not, in general, decree performance of a contract for the sale of stock or goods, inasmuch as with the same money, either not paid, as in agreements to deliver goods on receiving the price agreed on, where the party agreeing to deliver fails to do so on tender of the money, or recovered in damages where the money has been paid, the same quantity of the stock or goods may ordinarily be purchased. But there are exceptions to the rule, and the Supreme Court of the United States seem inclined to give relief in equity by specific performance on contracts respecting personalty, to a greater extent than that to which the Court of Chancery in England has yet gone. 5 *Wheat.* 151; 1 *Peter's Rep.* 305. And in 10 *Connecticut Rep.* 121, specific performance by transfer of stock was decreed.

But the case made by this bill, if established, is a case of trust.

It appears by the proofs that the three hundred and seventy-eight shares were transferred to Morton in pursuance of a written agreement, made and entered into by and between Collins, Morton, Perkins and Company, and the People's Bank at Paterson, under their seals, dated October 21st, 1841. This agreement recites that the parties are variously interested in and have claims upon certain three hundred and eighty-eight shares of the stock of the said bank, standing in the name of Collins; that Perkins and Company had attached the interest of Collins; that Bigelow, Canfield and Company had also attached the same, and had afterwards assigned their interest to Morton; (these attachments were in this state;) that a mutual agreement had been made between all the parties, for the final settlement of the whole matter; that the bank, with the assent of Collins, should hold the stock until after the settlement of a suit in New York between this bank and a certain bank in



---

Kimball v. Morton.

---

New York. It is then, by the said written agreement, consented and agreed that a provisional transfer of three hundred and seventy shares of the stock be made to Morton; that the certificate for the said stock remain in escrow in the hands of L. B. Woodruff, esquire; that so soon as the settlement with the New York bank is carried out, the transfer to Morton shall take effect and the certificate be delivered to him; that thereupon all dividends in arrear on the stock should be paid to Morton; the residue of the three hundred and eighty-eight shares, being ten shares, to be transferred to the said People's Bank, and that on the execution of the said agreement, the rights, interest and claims of the parties thereto to the stock, should be deemed definitively agreed and settled, and that all claims and demands on each other in relation to the said stock, except such as are created by or arise under the said agreement, should cease.

Under this agreement, the three hundred and seventy-eight shares were, on the day of the date of the agreement, transferred on the books of the bank to Morton, and the certificate therefor was delivered to Woodruff, to hold and deliver pursuant to the terms of the contract.

On the 9th of November, 1841, Woodruff delivered the certificate to Morton, and took his receipt for it at the foot of the agreement or a copy of it.

There is nothing in this agreement binding Morton, after the transfer should be made to him, to transfer any of these shares to any person whatever. The agreement provides only for the transfer to him. It is not, therefore, by force of anything in the agreement that the complainants can succeed. They claim that notwithstanding the written agreement is silent as to any transfer by Morton of any portion of the stock, after he should receive the certificate for it, yet that it was agreed between the parties and by Morton, that when Morton should receive the certificate, he should transfer forty-eight of the shares to Perkins and Company, and eighty of them to the complainants, and retain the remaining two hundred and fifty shares for himself.

Is this part of the complainants' case established? I think it is. In the first place, the terms of the written agreement are opposed to the idea that the whole three hundred and seventy-

## Kimball v. Morton.

eight shares were to be transferred to Morton for his own benefit. It recites that the parties thereto are variously interested in and have claims on the stock, and states that it is consented and agreed that a *provisional* transfer be made to Morton. Again, Morton, in his answer, does not claim the benefit of the written agreement according to the terms of it, but admits that he did agree to receive two hundred and fifty-three shares of the stock, (I am satisfied that he adds the three shares because the complainants in their bill had fallen into a mistake in putting the number Morton was to have, at two hundred and fifty-three, instead of two hundred and fifty,) for the indebtedness of Collins to him, and to transfer ten shares to the bank, and forty-eight shares to Perkins and Company, and admits that it was agreed between all the parties, that when Collins should pay the costs of the attachment in New York at the suit of him and his partner Filly, and should satisfy the creditors who had come in under that attachment, and repay him one hundred and fifty dollars he had advanced to Collins to pay costs, he should transfer to Collins, or whoever was entitled to them under Collins, the remaining shares ; (he calls them seventy-seven, deducting the three which he added, as before stated, to the two hundred and fifty ;) and he admits that the agent of the complainants was present when the agreement was made, and showed him the assignment stated in the bill, to the said agent of the complainant.

I think that this answer, as it is drawn, and in view of the nature of the transaction and the circumstances attending it, should be considered a sufficient admission of the trust. If the answer could be considered as making a distinct allegation that such conditions were agreed upon as to the eighty shares, still it admits a trust as to these shares ; and I think parol evidence is admissible to show the terms of the trust, and to contradict his allegations as to conditions.

It was objected that the statute of frauds requires all declarations or creations of trust to be in writing.

The statute does not extend to trusts of personalty. 2 *Story*, § 972. Three witnesses, on the part of the complainants, testify that the agreement of Morton to transfer the eighty shares to Collins or his assignees, was without any condition whatever.

---

Rogers v. Rogers.

---

The attachment at the suit of Filly was not till after the assignment by Collins to Morton for the purposes of the agreement.

I am of opinion that the complainants are entitled to relief. A transfer of the eighty shares will be decreed.

Decree accordingly.

CITED in *Hooper v. Holmes*, 3 Stock. 124.

---

ANNA ROGERS AND ELTON ROGERS, EXECUTORS OF, AND  
TRUSTEES UNDER THE WILL OF WILLIAM ROGERS, DE-  
CEASED, v. WILLIAM ROGERS, SIMEON WARRINGTON  
ET AL.

1. A and B held a mortgage given to them as trustees, on the undivided half of a mill seat. B, in his own right, held a subsequent mortgage on the same half. On proceedings for partition between the owners of the mill seat, it was ordered to be sold at auction, and was so sold by the commissioners. The order for sale and the conditions of sale were silent as to whether the property was to be sold subject to or free from encumbrance. *Held*, that parol proof was admissible to show that B was present at the sale, and agreed that the property should be sold free from encumbrance, and received from the commissioners the mortgagor's half of the proceeds of the sale, knowing that the purchaser paid the money understanding that the property was sold free from encumbrance, and that the mortgages were to be canceled.

2. B applied a part of the money he received to the payment of his, the junior mortgage, in full, and the residue of it towards paying the mortgage to the trustees, thus leaving a balance due on that mortgage. The half of the proceeds of sale received by B was sufficient to pay the mortgage to the trustees, and part of the mortgage held by B in his own right. *Held*, that the mortgage to the trustees was satisfied.

---

William Rogers gave a mortgage to Anna Rogers and Elton Rogers, executors of, and trustees under the will of William Rogers, deceased, dated in 1824, on the undivided half of a mill seat; the other undivided half being owned by John Warrington. In February, 1830, the said mortgagor gave another mortgage on his undivided half to Elton Rogers, in his own right. Commissioners were appointed to divide the property between the owners, the said mortgagor, and John Warrington. The property being incapable of division, it was ordered to be



---

Rogers v. Rogers.

---

sold by the commissioners at public sale, and was sold accordingly, July 24th, 1830, to Jacob Haines, for \$2055, and was conveyed by the commissioners to him. In September, 1830, Haines conveyed the property to the defendant, Simeon Warrington, for the same sum at which it was struck off to him at the commissioners' sale. In November, 1833, Simeon Warrington mortgaged the property to Isaac Hewlings for \$1500.

The bill charges that, notwithstanding the said commissioners' sale, the mortgagor's undivided half of the property remained subject to the first mortgage—the mortgage given to the complainants, the executors and trustees aforesaid; and further charges that, on the 9th of March, 1831, Elton Rogers, as the agent of the mortgagor, and not in his own right, or as executor or trustee as aforesaid, received in behalf of the mortgagor, from the commissioners, the equal half of the proceeds of the commissioners' sale; that Anna Rogers did not, in any way, participate in or meddle with the said receipt, but that the same was the act of Elton, acting as the agent solely on behalf of the mortgagor; and that, by the direction of the mortgagor, he, Elton, applied the said money, first to the payment of what was due to him on his, the junior mortgage, and the balance towards paying the mortgage to the complainants; and that a balance remains due on the mortgage of the complainants.

Simeon Warrington answers the bill. The answer states that, at the time of the commissioners' sale, the premises were first set up subject to the mortgages, but that no bid whatever could be obtained therefor. That Elton Rogers then proposed that the premises should be sold free from the encumbrances, and declared publicly that on the payment of the money bid for the premises, he would deliver up the mortgages to be canceled. That the commissioners did thereupon, in his presence, and with his knowledge and consent, and at his request, sell the premises at public outcry, clear of all encumbrances, expressly making known, in the presence of Elton, previous to the sale, that the premises would be so sold; and that Elton was a competitor at the sale, and bid for the premises \$2050. That said Haines bidding five dollars more, the premises were struck



---

Rogers v. Rogers.

---

off and sold to him for \$2055, clear of all encumbrances. That he, Simeon Warrington, before the delivery of the deed to Haines, agreed to take the premises and become the paymaster. That the purchase money for William Rogers' half was given to Hulme, one of the commissioners, to be paid when the mortgages should be given up to be canceled. That the net proceeds of the commissioners' sale amounted to \$1927.32, and that, by an order of the Supreme Court, of February Term, 1831, the commissioners were directed to pay the one-half thereof to William Rogers, the mortgagor, and the other half to John Warrington, the other tenant in common. That on the 9th of March, 1831, the one-half so directed to be paid to William Rogers, was, by the commissioner Hulme, paid to Elton Rogers, That the mortgages were then in the hands of Wills, another of the commissioners, and that the money was so paid, on the express understanding that the mortgages had been delivered up by Elton to the commissioners, to be canceled.

He admits that the receipt given by Elton to the commissioners for the said money, was signed by Elton as agent for William Rogers, the mortgagor, the said money having been ordered by the court to be paid to the said William, and says that Elton acted as the agent of William, and had the management of his business affairs.

The testimony in the cause is as follows:

George Hulme, sworn for defendant, says he was one of the said commissioners; Daniel Wills and Joseph Saunders were the other commissioners; the commissioners reported that the property could not be divided, and it was ordered to be sold; it was sold on the premises, July 24th, 1830; Exhibit No. 1 on the part of the defendant, is one of the advertisements of sale; Saunders, one of the commissioners, was absent; the property was first put up for sale, subject to the encumbrances; the crier dwelt on it some time, but could not get one bid—not a cent; the parties who held the encumbrances, he believes, were present; he knew Elton Rogers; the others he did not know; they got together; they informed Wills and him that they had concluded to sell it clear of encumbrances;

---

Rogers v. Rogers.

---

proclamation was then made that the property would be sold clear of encumbrances; it was made public, to let everybody know that was there; it was set up again, and bid for; when something like two thousand dollars was bid, he saw that the thing seemed to be like winding up; he then took Elton aside, and said to him, "Now that we are selling the property clear of encumbrances, you must bid till you are satisfied;" he returned to the crier, and did bid; after that, Jacob Haines bid; it dwelt on his bid some time; we could get no further bid, though it was rather low; the commissioners wanted to get more; they then consulted Elton Rogers and John Warrington, as to whether it should then be cried off, or the sale adjourned; they did not get the answer direct from them; Warrington said he would leave it all to Elton; he said this more than once; it was then cried off; it was agreed by both of them, as he understood, that it should be cried off; he was express in it, because he did not want it cried off unless they were both satisfied; it was distinctly understood that it was to be sold clear of all encumbrances; they could not get a bid until it was so; it was struck off to Jacob Haines for two thousand and fifty-five dollars. Exhibit No. 2 on the part of the defendant, being shown to witness, he says it is the deed from the commissioners to Haines; he cannot be positive when or where the deed to Haines was delivered; the whole of the purchase money was placed in his hands; he cannot tell how they got together, but the parties were at Mr. Wills' office, and word was sent to the witness to come up there; witness went up there with the money in his pocket; thinks Warrington was there; he knows Elton Rogers was there, and some other persons concerned in the business, but who, he cannot say; when he went into the office, he asked Mr. Wills, his colleague, who was the scrivener in all this business, if all the papers relating to the encumbrances were there; he said yes—holding up the papers in each hand—here they all are; he, witness, did not read the papers; witness then considered it all straight, and pulled out the money and counted it down to Mr. Wills; Elton Rogers was present; as he got near the door, about leaving the office, Mr. Wills or Elton, one of them—witness thinks it was Wills—said that Elton wanted the mortgage for Mr. Brown, the surrogate, to make a cal-

---

Rogers v. Rogers.

---

ulation of the loss that would be on them; witness believes he signified that he had no objection to Elton's having them for that purpose; witness left them with Mr. Wills; he did not know they were to go out of Wills' hands; he learned afterwards, from Wills, that the papers were in Brown's hands; witness went, two or three times, to Brown's for the mortgages, by himself; he felt uneasy about the situation of things; Brown did not give them to him; witness urged it, and claimed the papers, as one of the commissioners, and insisted on having them, as the commissioners' papers, and that no one else had any right to them; when Brown found that witness was determined to have them, he said he could not give them to witness unless the parties were all present; Wills, Elton, and he got together, at Brown's office; both Wills and witness claimed the papers as theirs; Elton did not agree to let them have them; he wanted, as witness understood, to collect the balance on them; he left, and did not get the papers; the claim of Elton struck witness as very wrong, because it was so expressly understood, at the sale, that the property was sold clear of encumbrance; witness paid over the money, on the express understanding that the mortgages were to be given up; he would not have paid over a cent, if they had not been to be given up; the purchase money was placed in his hands on that understanding; he understood Elton Rogers and John Warrington were the parties interested; Elton represented William Rogers, and signed his name as agent, witness thinks, in the receipt he gave the commissioners.

Being cross-examined, this witness says—Exhibit G on the part of the complainants, is the receipt spoken of; Elton acted, throughout, as agent for William; Exhibit F on the part of the complainants, contains the conditions of sale; that is what we sold by; the bonds and mortgages were never given up to him; witness paid the money to Wills, and he took the said receipt, marked G; witness did not get the receipt at the time; Elton, at the sale, agreed that the mortgages should be given up to the commissioners; witness does not know that this promise was made in writing; Elton agreed to give them up, on condition that William's share of the purchase money, whatever the property brought, should be paid over to him, Elton;



---

Rogers v. Rogers.

---

witness always understood him to be acting as the agent of William; neither of the parties required an adjournment of the sale; witness asked them both; the commissioners sold the property without encumbrance, by the authority of the parties, Elton acting as agent of William; the encumbrances were not given up to witness, but when he paid the money to Wills he understood that the mortgages had been given up to Wills, as one of the commissioners, before witness paid over the money to him; he understood this from Wills' answer to his inquiry, in Elton's presence; witness paid the whole of the money to Wills.

Re-examined on the part of defendant, he says—he does not think he was aware, at the sale, who held the encumbrance.

Jacob Haines and Samuel Wilkins, sworn on the part of the defendant, fully confirm the statements of Mr. Hulme.

Daniel Wills, called by complainants, on his cross-examination, confirms the same facts. He was not questioned on this subject on the part of the complainants.

Joshua Matlock, called on the part of the complainants, swears he was present at the sale; the conditions of sale were read by Mr. Wills; they were written; near the end of the sale he found Elton was bidding, and some others; Haines asked Wills about the encumbrances; Wills then asked Elton concerning it; Elton said that when he got his money, for all he knew, the property would be clear; this was while the bidding was going on; he did not hear Elton agree to give up his claim on the property without receiving his money; he went with Elton to the sale and returned with him; on their way home Haines stopped them and asked Elton what was the amount of the mortgages on the property; Elton told him; Haines said he had money enough coming in, but if he should not happen to get it all by the time specified in the conditions for payment, if he, Elton, would wait until fall or spring, he would pay him all up; Elton replied very well, or something to that import; he, witness, is a brother-in-law of Elton, and is a little hard of hearing; Haines did not in that conversation mention the amount he would pay.

John Warrington, called for complainants, says—Stacy Martin, before the sale, gave him a note for one hundred dollars,

---

Rogers v. Rogers.

---

conditionally, that if his father-in-law, Jacob Haines, bought the mill, and he, Stacy, got there to live, he would pay it; the one-half was sold at \$1200, but he gave way and let it go for less; he gave the note back after the sale; he did not bid at the sale; he did not consider himself bound not to bid; Jacob Haines did not know about the note, but Elton Rogers did; he gave up the note without any consideration, after Haines had agreed to let Simeon have the mill; Stacy gave me the note because his father-in-law was a little afraid of giving him the price, and he was willing to help out a little, rather than not have the mill; Haines did not give, witness thinks, quite as much as he, witness, expected; he had told Haines, he thinks, that he was willing to take \$1200; witness is the father of Simeon; Simeon borrowed the money to pay for the property; witness was his security on the bond to Dr. Spencer, of whom it was borrowed; witness paid the money to Mr. Hulme for Simeon; he paid it to Mr. Hulme, to pay over to Elton, when the commissioners got the mortgages into their own hands, and not before, and he, Mr. Hulme, promised to do it; at the commissioners' sale, after they found the property would not sell with the encumbrances on, they put it up free of encumbrances.

Nathan Warrington, called for complainants, says he was at the sale; there were written conditions; Mr. Wills read the conditions, and then made proclamation that the premises were to be sold free of encumbrances—all encumbrances to be given up; Jacob Haines then asked if Elton said so; Elton then said, "Be sure, the mortgages would be given up when the money was paid;" Haines and Elton then bid it up to \$2050; then they stopped a while, and Wills, Hulme and Elton consulted together, and after that Wills said they would sell the property then; Haines then bid five dollars, and it was knocked off to him; witness did not know, at the time, of any arrangement between John Warrington and Stacy Martin about a note; he knew there was an arrangement about the sale of the property, between Jacob Haines and John Warrington; Haines was to make up to John \$1200 for his half, let the property bring what it might; witness was present when Haines stopped Elton Rogers and Joshua Matlock,

---

Rogers v. Rogers.

---

after the sale ; Haines told Elton, he thinks, that he should not be able to pay all at the time fixed for delivering the deed, but if he would wait a little he thought he should be able to pay the remainder ; Haines asked Elton the amount of the mortgages, and Elton told him, but the amount witness does not recollect ; he cannot say he understood Haines to say he would pay off the whole of the mortgages. Witness knew of the arrangement before mentioned, between Haines and John Warrington, before the commissioners' sale, and mentioned it to Elton Rogers, that he might have a chance to take care of himself. He mentioned it to Elton on the day of the sale, before the sale took place.

The cause was heard on the pleadings and proofs.

*G. D. Wall*, for the complainants.

*H. W. Green*, for the defendants.

THE CHANCELLOR. This case, upon the testimony, is clearly with the defendants. The amount bid, taken in connection with the fact that the property was first set up subject to the mortgages and no bid could be obtained, shows that the sale made was not a sale subject to the encumbrances. The amount bid, and at which the property was struck off, was the sum which the purchaser agreed to pay for the whole property. There is nothing in the conditions of sale opposed to this. These conditions, as well as the order for the sale, are silent as to whether the property was to be sold subject to or free from encumbrance. It was said the commissioners could not sell free of encumbrance. The mortgagee could agree that the sale should be so made, and that he would give up the mortgage on receiving the purchase money. It was objected, that the conditions of sale were written, and that parol evidence to show that the sale was made clear of encumbrances was inadmissible. The conditions were silent as to how the property was to be sold, in this respect. The parol evidence, therefore, does not contradict the written conditions ; and it may be said, further, that it does not add to the conditions. They provide generally for the sale of the property ; and the pre-



---

Rogers v. Rogers.

---

sumption arising from the conditions would be, that the property, and not merely an equity of redemption, was to be sold.

It was said that Elton Rogers, being only one of two co-executors and trustees, could not make a valid agreement that the property should be sold clear of the first mortgage, that being given to both executors and trustees. He could agree for himself, and in reference to his own mortgage, which was the junior mortgage; and the property brought, and it was well understood at and before the sale, that it would bring more than enough to satisfy the first mortgage. It was, in substance and effect, an agreement by him that if the proceeds of the sale fell short of paying his mortgage, after satisfying the prior one, he would immediately give up his mortgage on receiving the residue after satisfying the prior mortgage.

It was said that the commissioners' deed only conveyed the right and interest of the mortgagor. This, I apprehend, is a mistake. The deed is in the usual form. It conveys the property, describing it, together with all, &c., and all the right, title and interest, &c. The whole property, both halves, one-half not being at all encumbered, was conveyed by the same deed, and by the same language. No distinction or difference of language was used in respect to the different halves.

The case is the same as if the whole property was subject to one mortgage only, and on a proposed sale of the property at auction, it was found that no one was willing to bid the amount of the mortgage. It is clear that the mortgagor could not sell without the mortgagee's consent; but the mortgagee may consent that it be sold for what it will bring, and that if it sell for less than the amount due on the mortgage, he will nevertheless receive the amount bid and cancel the mortgage.

But, it is asked, can this be done without writing? If the sale is actually made on such an agreement without writing, and the sum bid is bid on these terms, though it may be that the mortgagee might refuse to receive the money and give up his mortgage, yet, if he receives the purchase money, knowing that the purchaser pays it as for a clear title, he cannot be permitted afterwards to set up his mortgage as a lien. The statute of frauds will not protect him in such a transaction.

---

Rogers v. Rogers.

---

There is nothing in the terms of the written receipt he gave that helps him. On the contrary, its operation is against him. It says, "Received from the commissioners appointed to make sale of certain real estate held by William Rogers and John Warrington, as tenants in common, 963 dollars and 66 cents, being the equal half of the sales of said real estate, after deducting thereout the taxed bill of costs, which said sum was, by said court, directed to be paid to William Rogers, to defray certain mortgages on the premises;" and he signs it as the agent of William Rogers.

Now, if the property was sold subject to the encumbrances, the proceeds of the sale would not go to defray the mortgages. If that had been the case, the property in the hands of the purchaser would have remained liable for the amount of all the mortgages, and the proceeds of the sale would have been payable, without any condition or qualification, to the owner of the property.

The counsel for the complainants would have us understand or infer, from the case as presented by the proofs, that the sale must have been made in this wise: the property to be sold to the highest bidder; the amount bid to be applied towards paying the mortgages; and if it be not sufficient, then the property in the hands of the purchaser to be liable for the balance.

This would be saying to the bidders, the property will be sold to the highest bidder, but it cannot be sold unless the bid is equal to the amount of the mortgages. If that had been the understanding, the first thing to have been done would have been to ascertain the precise amount due on the mortgages; and after this was done, the first bid (if anyone was willing to make it) would have been the amount of the mortgages, for what propriety would there have been in beginning at a lower bid. But it is proved by every one of the witnesses present, that an effort was made to sell subject to the mortgages, and not a bid could be had.

Again, as to the idea that his agreement was not binding on his co-trustee. I have said before, that the mortgage held by the trustees was the first mortgage, and there was enough to pay it. There is something extraordinary in Elton's application of the money. Why did he not apply the proceeds first to the

---

Rogers v. Rogers.

---

payment of the first mortgage? He was the active trustee, and held both the mortgages. The question must be considered here as if the first mortgage had been wholly paid off, and the deficit was claimed on his own mortgage, against and in opposition to his own agreement at the sale. Fairness and ingenuousness required him to pay the first mortgage, and to meet the question on his own mortgage. It is the same case as if he was the only mortgagee. And in this view, the fact that he bid himself at the sale, is strong, perhaps conclusive. He bid \$2050. Did he mean to pay that sum to the mortgagor? Did he bid that sum over and above the mortgage?

It was objected that there was a fraud practiced on Elton at the sale; that there was an arrangement between Haines, the purchaser at the sale, and the owner of the other half, that Haines was to make up to him \$1200 for his half, let the property bring what it might at the sale. More than one answer may be given to this. Elton knew of that arrangement at the sale, and before the property was sold. This is distinctly proved by Nathan Warrington, who swears he told Elton of this arrangement, that he might have a chance to take care of himself. And yet he suffers the sale to proceed free of encumbrance, and receives of the proceeds of the sale the half belonging to the mortgagor, for whom he was acting as agent.

It is evident he understood that the money paid was paid as in full for the property, free from encumbrance. It was so paid. This is distinctly proved. If he received it knowing the purchaser paid it in that way, this court cannot give effect to any mental reservation of his at the time; that after getting the money, he would so arrange it as to throw the deficit on the first mortgage, and collect it on that. If he should think himself justified in so doing, under an idea that a fraudulent arrangement had been made between Warrington and Haines as to the other half, the court differs. This idea of counter-cheating cannot be entertained here.

It was said that the property should be sold again, under a decree of this court, and if it brings more than it did before, the surplus should be applied to the complainant's mortgage. This would not relieve us from the difficulty. A new mortgage has been given by the grantee of the purchaser at the commission-



---

Longstreet v. Shipman.

---

ers' sale, for \$1500 dollars ; and there is no probability that the property would bring enough to satisfy that, after paying the two mortgages in full. It is better to meet the question here.

The fact that eight years have been permitted by the complainants to elapse, and that in the meantime a mortgage has been given by the grantee of the purchaser at the commissioners' sale, is entitled to no small influence in the case, if it was doubtful without it.

The complainants' bill will be ordered to be dismissed.

Order accordingly.

---

AARON LONGSTREET v. CHARLES T. SHIPMAN AND WIFE  
ET AL.

A mortgage is given by A, living in this state, to B, of New York, on lands in this state, to secure the payment of a bond. The mortgagor, afterwards, for purposes of his own, executes, and causes to be recorded in the proper office of this state, a deed of the premises to the mortgagee. The mortgagee, without having assented to the deed, assigns the bond and mortgage, with all his other property, for the benefit of all his creditors. Afterwards, a creditor of the mortgagee attaches the land. The attachment will not hold the property against the mortgage.

---

On the 5th of March, 1839, Charles T. Shipman and wife executed a mortgage to the complainant, on real estate in New-ark. On the 28th of September, 1840, they executed another mortgage on the same premises to the defendant Thomas Brooks. Brooks lived in the city of New York. In February, 1841, a deed of the premises from Shipman and wife to Brooks, was recorded in the clerk's office of Essex county. On the 29th of March, 1842, Brooks assigned all his estate, real and personal, to the defendants Theophilus Pierce and Jonathan Thorn, of the city of New York, for the benefit of his creditors. The bond and mortgage from Shipman and wife to Brooks, are mentioned in the schedule accompanying the assignment. In December, 1842, Brooks was, in New York, discharged under the bankrupt law, and the defendant Coventry H. Waddell was appointed his assignee in bankruptcy. In

---

Longstreet v. Shipman.

---

January, 1843, Shipman was, in New Jersey, discharged as a bankrupt, and the defendant Charles T. Gray was appointed his assignee. In the vacation preceding the November Term, 1842, of the Supreme Court, an attachment was issued out of that court, against the goods, &c., and lands and tenements of Brooks, at the suit of the defendants Smull and Gilman, by virtue of which the premises described in the mortgages were attached as the property of Brooks, subject to the mortgage to the complainant.

The bill is filed by Longstreet, to foreclose his mortgage. It states the foregoing facts, and makes Shipman and his wife; Gray, his assignee in bankruptcy; Brooks, Pierce and Thorn, the assignees of Brooks in trust for his creditors; Waddell, his assignee in bankruptcy; Smull and Gilman, the attaching creditors, and certain judgment creditors of Shipman, parties defendants.

The controversy is between the defendants Smull and Gilman, the attaching creditors of Brooks, and the defendants Pierce and Thorn, the assignees of Brooks in trust for all his creditors. There is no difficulty as to the mortgage of the complainant.

The cause was heard on the pleadings and proofs.

*A. Whitehead*, for the defendants Pierce and Thorn.

*Gifford*, for the defendants Smull and Gilman, the attaching creditors, and for the complainant.

**THE CHANCELLOR.** The attaching creditors insist that by the deed from Shipman and wife, the mortgagors, to Brooks, the second mortgagee, Brooks became the owner of the property, subject only to the Longstreet mortgage; and that they have become entitled to this interest of Brooks, under the attachment. The defendants Pierce and Thorn insist that the deed from Shipman and wife to Brooks, was made without the knowledge or consent of Brooks, and was never accepted by him; and that, therefore, the bond and mortgage to Brooks remained unextinguished, and were valid securities when assigned to them, and are still valid securities in their hands.

---

Longstreet v. Shipman.

---

The opposing defendants admit that the bond and mortgage from Shipman and wife to Brooks, were *bona fide*; and, as between them, the question presented is whether, under the testimony in the cause, the proceeds of this property, after paying the first mortgage, shall go to the attaching creditors, only, of Brooks, or to Pierce and Thorn, in trust for all his creditors, equally.

If the deed from Shipman and wife to Brooks was a business transaction between them; if Brooks really bought the property, and agreed to take it in payment of the bond which the mortgage on it was given to secure—then the bond and mortgage were extinguished, and Brooks became the owner of the property, subject to the first mortgage, and this interest would be bound by the attachment, and the attaching creditors would take the proceeds of the property, subject to complainant's mortgage. But, under the evidence in the cause, I am satisfied that the deed from Shipman to Brooks was not made on a sale of the property. The making of that deed, and causing it to be recorded, was an arrangement by Shipman, for purposes of his own. And if Brooks never assented to it, it would be no extinguishment of his bond and mortgage—he might assign his bond and mortgage, notwithstanding. He swears he never did assent to it. So far, then, as this property may be worth more than the first mortgage, and what is due, if anything, on the second mortgage, the creditors of Shipman are entitled to the benefit of it.

But if the deed from Shipman and wife to Brooks should be considered as extinguishing his bond and mortgage, so that they could not afterwards be assigned, and as vesting the title of these premises in Brooks, yet the attaching creditors are in no better situation, for the assignment by Brooks, to Pierce and Thorn, was made in March, 1842, previous to the issuing of the attachment, and was an assignment of all his estate, real and personal.

In reference, therefore, to the matter in controversy between the particular creditors of Brooks, who have joined in the attachment issued in New Jersey, and Brooks' assignees in trust for all his creditors, the investigation of the case conducts us to a result which, even if it were at all doubtful, would still yield



---

Rogers, an alleged Lunatic.

---

the satisfaction of being agreeable to the doctrine of this court, that among creditors, equality is equity. The attaching creditors are still left, in reference to all that can be obtained from these premises for the benefit of Brooks' creditors, on an equal footing with all the other creditors of Brooks.

It is the opinion of the court, therefore, that the said attachment is no lien on the mortgaged premises. A reference will be ordered, to ascertain the amount due the complainant on his mortgage, and the amount due on the mortgage given by Shipman and wife to Brooks, and by him assigned to Pierce and Thorn; and a sale will be decreed, and so much of the proceeds as will be necessary, will be applied to the payment of the sums found due on the mortgages, and the residue will be directed to be paid to the assignee in bankruptcy of Charles T. Shipman.

Order accordingly.

---

IN THE MATTER OF THE ALLEGED LUNACY OF DAVID  
ROGERS.

1. A guardianship in lunacy may be superseded, on its being made to appear that he who had been found lunatic, is restored to sanity.

2. The usual course is, to refer it to a master to take proofs as to the state of mind of the petitioner, and to report the proofs and his opinion thereon. But though the master reports the proofs and his opinion thereon, that the petitioner is restored, the Chancellor, in his discretion, may direct the petitioner to appear before him for inspection and examination.

3. The Chancellor, in his discretion, may discharge the guardianship, on the ground of restored sanity, or direct an issue to try the question.

---

In 1843, a commission in the nature of a writ *de lunatico inquirendo*, was issued, directed to commissioners therein named, to inquire of the lunacy of David Rogers. The commission was executed in 1843, and an inquisition returned, finding that said Rogers was a lunatic.

In February, 1845, a petition was presented to the court by Rogers, supported by affidavits of different individuals, praying that his guardians may be discharged, and that the in-

---

Rogers, an alleged Lunatic.

---

quisition and the proceedings thereon may be vacated and set aside.

An order was thereupon made, referring it to a master to inquire whether the said David Rogers is restored to his reason and understanding, and is of sound and disposing mind and memory.

The master made his report on the 8th of April, 1845, that the petitioner was restored to his reason and understanding, and was of sound and disposing mind and memory, and sent up the testimony on which his report was founded.

This report was not satisfactory to the guardians, and the Chancellor directed an argument before him, and ordered that the petitioner be brought before the court for inspection and examination. This was done, and on that occasion he was subjected to a protracted examination, under the direction of the court, by questions propounded to him by his counsel and the counsel of the guardians.

The matter of the petition was then argued on the testimony returned by the master, and the answers of the alleged lunatic to the questions which had been propounded to him.

*Stratton and H. W. Green*, for the petitioner.

*Spencer and W. L. Dayton*, for the guardians.

Cases cited for the petitioner. 1 *Collinson on Idiots* 48, § 12; *Ib.* 49, § 14; *Ib.* 328, § 15; *Saxton* 24.

Cases cited for the guardians. *Shelford on Lunatics* 43, 51, 206; 3 *Brown's Ch. Rep.* 403; *Ib.* 277, 441; 1 *Eng. Eccl. Rep.* 296; 4 *Ib.* 186, 191; 13 *Ves., Jr.*, 88; 11 *Ib.* 11; 1 *Collinson* 324, § 3.

THE CHANCELLOR. I am clearly of opinion that, on the testimony and the inspection and examination of the petitioner, a final order should not be made against the prayer of the petition. The only doubt I have been able to entertain is, whether an issue should not be awarded. But, on consideration of the whole case, I am satisfied that a final order vacating the in-

---

Rogers, an alleged Lunatic.

---

quisition should be made. I do not propose to go at large into an examination of the testimony, or into a statement of the reasons which have brought me to this conclusion. It is a subject on which the ordinary rules of reasoning furnish no certain guide, and in reference to which, deductions apparently the most correct, are not to be relied on.

Is the petitioner now capable of managing his own affairs? Looking at the testimony without reference to the finding of the inquisition, it is my decided opinion that he is so. What influence, then, should be allowed to the fact that, two years ago, he was found to be incapable? It is certainly entitled to some influence, but not on the ground that, though sane now, he may again be, and perhaps is more likely to be afflicted in the same way. The court can act only in reference to his present state of mind; the future is inscrutable to us all.

The only influence it can properly exert on the mind of the court is, in causing apprehension that all the evidence of his restored sanity, derived from all the sources to which we may address ourselves, may, from the insidiousness of a distemper of the mind, be fallacious. This apprehension should influence the court to proceed with caution in vacating an inquisition. Yet there are frequent instances of restoration.

This brings us to the consideration, what degree of doubt the court should indulge, arising from the inquisition two years ago, against the idea of his present capability.

On one side it was contended that the present question should be determined without reference to the finding of the inquisition two years ago; that not only the future, but the past should be shut out. If mind is what some suppose it to be, this may be correct; but it is not consistent with my ideas of it, and of the laws that govern it.

On the other side, it was contended that the inquisition should not be vacated, unless the court be satisfied, beyond all doubt, of a permanent restoration of sanity. This may do when we come to be so well acquainted with the nature of mind as to be able to say of the mind of a sane individual, that he will, beyond all doubt, always remain sane.

I suppose it to be an approach to the true rule for the present action of the court to say that if, taking the finding of the



---

Bell v. Hall.

---

inquisition as a part of the evidence to be considered, the court is satisfied of present capacity, the relief sought by the petition should be granted.

Looking at the whole case, the nature of the incapacity that once existed, or was supposed to exist, as described by the witnesses, the symptoms of which, as they say, were trading and driving about; and considering that for the last eight months, at least, the petitioner has had the management and control of his farming and other business, and that his own immediate family, whose interests are more at stake than those of any other person, are satisfied of his capacity to manage his affairs; and considering further, that if disease in this form should again be laid on him, the guardianship of this court could again be extended over him and his property, I am of opinion that the relief sought by the petition should be granted.

Order accordingly.

CITED in *Matter of Weis*, 1 C. E. Gr. 319.

---

THE ADMINISTRATOR OF EDWARD S. BELL v. JOHN B.  
HALL AND HENRY B. STOLL.

1. An application for leave to amend an answer, or file a supplemental answer, after depositions have been taken, should be listened to with distrust.
2. The defendant had answered that he did not know of a certain agreement, until after the assignment to him of a certain judgment and execution. The execution had been levied on the goods of the defendant in the execution. The defendant in this court, who had put in his answer, had released the goods levied on from the lien of the execution. He moved for leave to amend his answer by stating that he did not know of the agreement until after he had executed the release, or for leave to file a supplemental answer to make that allegation. The motion was denied.
3. What the affidavit on which an application to amend an answer, or file a supplemental answer, should, in general, state.

---

The case made by the bill is this: In March, 1840, Henry B. Stoll and Edward S. Bell entered into partnership as merchants, at Stanhope, under the name of Stoll and Bell, and bought a stock of goods from Andrew A. Smalley, of that place, and gave to Smalley their notes for the price; one of which he

---

Bell v. Hall.

---

assigned to Coursen and Woodruff, of New York. In March, 1841, the partnership of Stoll and Bell was dissolved, by mutual consent, by an agreement in writing, by which, among other things, it was agreed that Stoll should take the stock of goods on hand and the accounts and the effects of the partnership, and pay the debts of the partnership and release Bell therefrom. In May, 1843, Coursen and Woodruff recovered judgment against Stoll and Bell, on the note of Stoll and Bell so assigned to them, and caused an execution to be issued thereon, returnable to the August Term, 1843, of the Sussex Circuit Court. The execution was levied on the personal estate of Stoll, including his stock of goods and merchandise, and on his real estate; and was also levied on the personal and real estate of Bell. Stoll paid Coursen and Woodruff \$100 on the execution. The judgment and execution were then assigned by C. and W. to the defendant, John B. Hall. After this, Stoll continued to sell from the stock of goods levied on, and Hall gave to the sheriff directions to stay proceedings on the execution. Bell then informed Hall of the agreement made between Stoll and him at the dissolution, that Stoll was to pay the debts of the firm. Stoll afterwards sold and delivered to Andrew A. Smalley the whole stock of goods; and Hall released to Smalley all claim thereon under the said judgment and execution. Smalley gave his notes to Stoll for the price of the goods, which notes were transferred by Stoll to Hall.

Hall, in his answer, says that at the time of the assignment of the judgment and execution to him, he had no knowledge or intimation of any agreement between Stoll and Bell that Stoll was to pay the debts of the firm; that he had never seen any such agreement, and had no knowledge of any, until some time after the assignment of the judgment and execution and the stay of the execution given by him to the sheriff.

A replication was filed, and depositions have been taken on both sides.

A motion is now made for leave to amend the answer of Hall, by inserting an allegation that he had no knowledge of the agreement between Stoll and Bell, till after the release given by him to Smalley was executed, or for leave to file a supplemental answer to make that allegation.

---

Robbins v. Abrahams.

---

*Johnson and Haines*, for the motion.

*Leport and P. D. Vroom*, *contra*.

THE CHANCELLOR. By the present practice in England, an amendment of an answer is not permitted; leave must be obtained to file a supplemental answer. I am not aware that this rule has been adopted in this court. But, whether the application is for leave to amend the answer, or for leave to file a supplemental answer, if the allegation proposed to be superadded is material, and prejudicial to the complainant, and the application is not made until after depositions have been taken, it should be listened to with distrust. It is an application to the discretion of the court. An omission by plain mistake might, under favorable circumstances, be allowed to be supplied; but, in general, the defendant should state by affidavit that, when he put in his answer, he did not know the circumstances on which he makes the application, or any other circumstances on which he ought to have stated the fact otherwise. 1 *Smith's Ch. Prac.* 270; 4 *Hen. and Munf.* 405.

I think it would be a dangerous precedent, in this stage of the cause, to allow so material an amendment as that proposed to be made.

Motion denied.

---

JOHN ROBBINS v. GEORGE D. ABRAHAMS AND PHEBE, HIS WIFE, AND JAMES BURROWS, HER TRUSTEE.

If there be ground for apprehension on the part of the wife that her husband will not make a proper defence for her, leave will be granted to her to answer separately from her husband.

---

In this case, the answer of the wife and her trustee was, at the last term, on motion of the complainant, ordered to be suppressed. On petition of the wife, a motion is now made that the wife have leave to answer separately from her husband.



---

Corrigan v. Trenton Delaware Falls Co.

---

The bill is for the foreclosure of a mortgage given by her and her trustee to secure a bond given by the husband for money borrowed by him.

*P. D. Vroom*, for the motion. He cited *Milford's Pl.* 151.

*C. S. Green*, *contra*.

THE CHANCELLOR. From the nature of the case, as disclosed by the petition and the arguments of counsel, I am of opinion that it is a proper case in which to allow the wife to answer separately. It is a case in which the husband might not be disposed to set up a defence, which, if made, might avail her.

If from such or any other cause, there is ground for apprehension on the part of the wife that her husband will not make a proper defence for her, she will be allowed to answer separately from her husband.

Order accordingly.

---

ANDREW CORRIGAN v. THE TRENTON DELAWARE FALLS  
COMPANY.

The impression of a distinctive corporation seal on an instrument calling for the seal of the corporation, held to be a seal.

---

On a bill filed May 29th, 1843, against The Trenton Delaware Falls Company, by Andrew Corrigan, a judgment creditor of the said company, for himself and all others the creditors and stockholders of the said company, who should come in and seek relief by and contribute to the expense of the suit, stating the insolvency of the company, and the suspension of its ordinary business for want of funds to carry on the same, an injunction was granted, and receivers were appointed to take possession of the property of the company, under and by virtue of the provisions of the act entitled "An act to prevent frauds by incorporated companies," passed February 16th, 1829.

In the progress of the cause, and on the 20th of January, 1845, in pursuance of an order theretofore made in the cause, directing the receivers to ascertain and report the amounts and order of priority of the mortgages and judgments, and the amount of other debts due from the company, the receivers made report accordingly. This report was brought before the Chancellor on separate appeals of several judgment creditors and a mortgage creditor of the company. A number of exceptions were taken to the report. The exception which was argued prior to this term, was an exception to several of the mortgages reported as having been given by the company, on the ground alleged, that they were not executed under a lawful seal. The concluding clause of the mortgages, respectively, calls for the seal of the corporation, and the impression of a seal purporting to be the distinctive seal of the corporation, at the proper place for a seal, appeared on the papers on which the writings purporting to be mortgages, respectively, were written, without wax or seal or any other substance.

*W. Halsted*, for the appellants, cited 1 *Hal.* 169; 6 *Hal.* 178; 5 *Johns. Rep.* 238; 2 *Hill's Rep.* 227; 3 *Ibid.* 493; and contended that a mere impression on the paper was a nullity.

*H. W. Green, contra.* The impression of the seal is there, and the attestation is correct. The question is, is this a seal? Our Supreme Court has decided that an ink scroll is no seal, except in instruments for the payment of money. The case cited by Mr. H., from 5 *Johns.*, decides that an ink scroll or device is not a seal.

In 3 *Inst.* 169, it is said, "*Sigillum est cera impressa, et sine impressione nullum est sigillum.*" This proves too much; for it is clear that a wafer and paper is good without an impression. He read from *Perkins*, §§ 134, 136, and from 2 *New York Term Rep.* 362. In Virginia, an ink scroll is sufficient, if the concluding clause calls for a seal. 1 *Wash. Rep. Ct. of Appeals in Virginia* 42, 171. In Pennsylvania, an ink scroll is sufficient, and this independent of statute. 1 *Dall.* 63; 5 *Binney* 241; 1 *Serg. and Rawle* 72; 2 *Ibid.*

---

Corrigan v. Trenton Delaware Falls Co.

---

503; 1 *Watts* 322. In *Bee's Rep.* 140, the doctrine is, there must be something capable of receiving an impression. He cites 4 *Grif. Law Reg.* 1201, note 1. New York and New Jersey are the only two states in which it is held that a scroll is insufficient. He is not aware that the question should be considered so settled by the cases decided in our Supreme Court, as to control the opinion of this court. In reference to the late decisions in New York, reported in *Hill's Rep.*, he says the Kents and Spencers of New York are gone.

The wax is not the seal, but the impression. Here is the impression, incapable of being erased. Where is the common sense of first putting paste, and then paper over it, and then an impression? The wax is abandoned, the impression is abandoned, but Chief Justice Kent said there must be some sticking substance yet. This corporation say they have annexed their seal, and if the seal is to be proved, a witness may be called to prove it is their seal. He hopes the courts in this state will not follow the further step taken in the cases in New York, reported in *Hill's Rep.* If we go to the common law, we must have wax and an impression. The doctrine contended for on the other side would lead to disastrous consequences. This question as to a corporate seal is new in this state. Again, the instruments are acknowledged as the deeds of the company, and are recorded, and the judgment creditors had notice of these mortgages.

*J. Wilson*, on the same side, said that the mere impression has been used on the process of this court, and is used in proceedings of the United States.

*Mr. Halsted*, in reply. This is simply a question between two creditors, who shall have the fund. He thinks the question is decided by the Supreme Court, and that this court will simply declare what the law now is. The Chancellor, on mere questions of law, follows the decisions at law. If those decisions are wrong, let them be overruled by the Court of Errors. The authorities cited by Mr. Green, except the case in *Watts*, were before our Supreme Court when they gave the law in the case cited. Suppose Chief Justice Kirkpatrick and Chief Justice Ewing were led in this matter by Chief Justice Kent, who Mr.



Green said dealt in classics as well as in civil law ; and suppose the opinion of this court should be different from the decisions of our Supreme Court ; is this the place to set those decisions aside ? This court is only concurrent with the Supreme Court ; and courtesy requires that it respect the opinion of that court. Shall the two courts come in conflict on this question ? It is a common law question, belonging appropriately to the Supreme Court ; and if Mr. Green's argument is good, it destroys the decisions of that court. It was said there is a distinction between corporate seals and the seals of individuals. Has a corporation any better right to say what shall be a seal than an individual has ? It was said the corporation declared it to be their seal. Did not the individual who executed the indenture, in the case decided by the Supreme Court, declare the same thing ? Suppose I put a scroll to a paper writing purporting to be my deed, and call it a seal, does that make it a seal ? This court has nothing to do with consequences. The practice as to subpœnas in chancery, if it ever was as Mr Wilson says it was, has been corrected. Perhaps the decisions of the Supreme Court corrected that loose practice.

The Chancellor intimated that if either party desired it, he should be disposed to send the question to the Supreme Court, as the more proper tribunal for its decision ; but if not, he would decide it. Neither party expressing such desire, the Chancellor said he should hold that the mortgages were well sealed. The opinion is as follows :

THE CHANCELLOR. I do not consider the decisions of the Supreme Court in reference to ink scrolls, as ruling this question. According to Lord Coke, a seal is wax with an impression, because wax without an impression is not a seal. "*Sigillum est cera impressa, quia cera sine impressione non est sigillum.*" It is clear that by this definition the impression makes the seal. It is true that if this definition is strictly taken, there must not only be an impression, but that impression must be made on wax. But the impression is the *sine qua non* of Lord Coke's seal ; the wax is only auxiliary ; it adheres to the paper and receives the impression, and is the material which annexes the

---

Corrigan v. Trenton Delaware Falls Co.

---

impression to the instrument. But we have long since grown out of the substance or essence of Lord Coke's definition, the impression; the question is, are we yet fast in the wax?

We have said by long practice, that both these were not necessary. With which of them would Lord Coke have been the better satisfied? Clearly with the impression; nay, he would not have dispensed with that at all. What proportion of the seals used on private papers now-a-days would fall within his definition? A wafer placed at the end of the name, with a piece of paper on it, or without the piece of paper, and without any impression, is a seal; and by the same rule or reasoning or absence of reasoning, a drop of sealing-wax dropped in proper position in relation to the name, and without impression, or bit of paper upon it, would be a seal; provided the writing called for a seal. Lord Coke's definition has been entirely departed from, and the mere wax or wafer, put on to receive the seal, is recognized as the seal. How can it be said that the impression, the essence of the definition, appearing on the paper, is no seal, because it is impressed without wax? Chief Justice Kent, in the case of *Warren v. Lynch*, 5 *John. Rep.* 238, which decides that an ink scroll is no seal, says, "the law has not, indeed, declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is, perhaps, not material." Is any such matter material, then, if the seal can be impressed without it? In the above cited case, Chief Justice Kent says, "the scroll has no one property of a seal." It is evident from this that he does not consider a scroll as an impression; and here there is a distinction between the case of *Warren v. Lynch*, as to scrolls, and the like decisions of our Supreme Court, and the case before us; for here the impression appears, and it is the impression of the corporate seal, the known, recognized and distinctive seal of the party executing the paper. If wax without the impression of a distinctive seal has come to be a seal, I do not see why the impression of a distinctive seal on the paper itself should be rejected as no seal, simply because it is made to appear on the paper without wax.

Perhaps as succinct and sensible an account of the ancient use of seals as is to be found, is that given in 1 *Morgan's Es-*

says 83. It is there said, "The seals of private persons are not full evidence by themselves, for it is not possible to suppose these seals to be universally known, and consequently they ought to be attested by something else, *i. e.*, by the oath of some that have knowledge of them; [that is, knowledge that the person whose seal it purports to be, uses that seal;] and when these seals are thus attested, they ought to be delivered in to the jury, because, though part of their credit arises from the oath that gives an account of their sealing, yet another part of their credit arises from the distinction of their own impression; for certainly every family had its own proper seal, as it is now in corporations. By this they distinguished their manner of contracting one from the other, and by false impressions of the seals they discovered a counterfeit contract; and therefore it was not the oath, but the impression of the seal accompanying it, that made up the complete credit of the instrument. But since, in private contracts, the distinction of sealing is in general worn out of use, and men usually seal with any impression that comes to hand, to be sure, there must be evidence of putting the seal; because, at this day, little can be discovered from the bare impression." This is, of course, spoken of private seals, as now used, and not of corporate seals.

In 1805, Justice Livingston, in delivering the opinion of the court in *Meredith v. Hinsdale*, 2 *N. Y. Term Rep.* 362, holds this language: "However ancient the use of seals as a mark of authenticity to instruments may be, or to whatever cause their origin may be ascribed, it is certain that, in modern times, a private seal is not regarded as evidence of truth, or of belonging to the party to whose signature it is affixed; but that men promiscuously use each other's seals, without attention to the impression or coat of arms. Thus it is no uncommon thing to see a seal containing the device, arms, and perhaps name of one person, used to authenticate the instrument of another. If it be not necessary, then, that in sealing a deed, the grantor should affix his own, but may adopt the seal of a stranger, why should it be exacted that the materials on which the impression is made should be of wax, wafer, or of any other particular composition? Why should not any impression or mark answer as well as the common mode of sealing, provided it be



---

Corrigan v. Trenton Delaware Falls Co.

---

durable, whether it be stamped on the paper itself, or on something laid upon it, if it be made as a solemn act of confirmation, and deliberately acknowledged as the seal of the party making it." But the cause was decided on another point. The instrument being made in Pennsylvania, where a scroll is recognized as a seal, the court in New York treated it as such, adopting the law of the place of the contract. At this time Kent was Chief Justice, and Thompson, Livingston, Spencer, and Tompkins, justices.

Five years afterwards, the question came up again before the Supreme Court of New York, in the case of *Warren v. Lynch*, 5 *John. Rep.* 238. Kent, Chief Justice, and Justices Thompson and Spencer, were still on the bench, and the places of Justices Livingston and Tompkins had been supplied by Justices Van Ness and Yates. The question in this case arose on a paper writing in other respects in the form of a note concluding, "Witness my hand and seal," signed by the maker, with the letters L. S. enclosed in an ink scroll, placed at the end of the name, where a seal is usually affixed to sealed instruments. The question was, whether by the laws of New York, this was a sealed instrument. The opinion was delivered by the Chief Justice. Before proceeding to examine the question, he takes occasion to say that what was said by Justice Livingston, in *Meredith v. Hinsdale*, in reference to the ink scroll, was his own opinion, and not that of the court. He then says that the object in requiring seals, as he presumes, was misapprehended by President Pendleton and by Mr. Justice Livingston. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name; for one person might use another's seal. The policy of requiring seals consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed. Now these two ideas are not at all opposed to each other; the reason may be, as Chief Justice Kent states, to give ceremony and solemnity, and yet the seal might, and no doubt did, in ancient times, help to designate the person who affixed it to his name. The expression, "One person might use another's seal," is proof that, in ancient times, before chirography became general, some had

their distinctive seals, and that the seal helped to designate the person who affixed it to his name ; and if it were not so, why the ancient idea of giving sealed instruments to the jury ?

A word as to the solemnity spoken of by Chief Justice Kent. Does it consist in the mere symbol ? Is there any more solemnity in a bit of wafer than in a scroll made with a pen ? The feeling of solemnity, if any, attending the execution of a sealed instrument, arises from a sense of the effect of the instrument, and not from the symbol used to characterize it as a sealed instrument ; and as to the remark of the court, that to adopt a scroll for a seal would be to abolish all distinction between writings sealed and writings not sealed, I apprehend, with great respect, it was not well considered. Our statute authorizing a scroll for a seal to money bonds, has had no such effect, and, on the principle above stated, could have no such effect.

Instruments are now proved by proving the putting of the seal, by producing the subscribing witness, who swears to the signature, and the acknowledgment of the seal. The seal may be wax or wafer, without paper or with, and without impression, and the same man may use, as a seal, one thing to-day and another to-morrow. As seals are used now, there seems to be no good reason why I may not affix a scroll, and acknowledge that to be my seal.

But it is not necessary, on this occasion, to come in conflict with the decisions of the Supreme Court as to ink scrolls. I am of opinion that the impression of a distinctive corporation seal, on an instrument calling for the seal of the corporation, is a lawful seal.

---

Smith v. Loomis et al.

---

JACOB B. SMITH v. LUTHER LOOMIS, SAMUEL P. LYMAN, THE  
SOMERVILLE MANUFACTURING COMPANY ET AL.

1. A corporation being embarrassed in its circumstances, six of the stockholders, two of them being also directors, enter into an agreement that, at any sale that may be made of the property of the company, either on execution or by the directors of the company, the property shall be bought by two of the stockholders who are parties to the agreement, on the best terms possible, and that the property, when so purchased, shall be held by them in trust, half for themselves, and half for the other parties to the agreement, each party to the agreement to pay, *pro rata*, for the purchase of the property, according to his interest in the same, to be thereafter declared. Two days after the making of this agreement, the two directors who are parties to it, and two other directors of the company, by an instrument executed under their individual hands and seals, convey to the two stockholders who by the said agreement were to be the purchasers, for a money consideration, acknowledged in the instrument to have been received, all the personal property of the company. On the day after this last writing was made, a judgment was confessed by the company, and a *fi. fa.* issued thereon, and levied on all the property of the company. A few days afterwards, in pursuance of a resolution passed by the votes of one of the directors, who is a party to the said agreement, and two other directors of the company, the president of the company executes and delivers to the two stockholders who, by the agreement, are to buy the property, a deed of all the real estate of the company, for a money consideration therein acknowledged to have been received, subject to the said confessed judgment. The two stockholders to whom all the property of the company is thus conveyed, then procure an assignment of this judgment, and cause the sheriff to advertise for sale by virtue of the execution issued thereon, all the property of the company. The answer states that it was a part of the arrangement that the consideration money for the property should be paid and applied directly on account of the company, to the creditors thereof, and that they, the two stockholders to whom the property was conveyed, should pay, out of the net earnings of the half held by them in trust for the other parties to the arrangement, after paying the costs of completing and putting the works in operation, a further sum sufficient to satisfy the remaining debts of the company; and that they should put the machinery in operation and make it productive as soon as circumstances would permit. A motion to dissolve an injunction issued on a bill filed by a subsequent judgment creditor, restraining the sale on the said execution, was denied.

2. In general, an injunction will not be dissolved unless all the defendants implicated in the charge have answered.

3. The *substance* of a charge must be admitted or denied; a mere literal answer is insufficient.



---

Smith v. Loomis et al.

---

4. Where a matter is charged in the bill which must, if true, be within the knowledge of the defendant, the substance of the charge should be answered directly, not evasively, nor by way of negative pregnant.

5. Where the circumstances charged are suspicious, or have the appearance of collusion and fraud, a defendant will be held to strict rule in answering.

---

The bill states the incorporation of the Somerville Manufacturing Company, in March, 1837; the capital stock not to exceed \$250,000, in shares of \$100 each; five directors, being stockholders, to be elected when 500 shares should be subscribed for, to hold their offices for one year, and until others should be elected; the directors to choose a president out of their own number when \$40,000 should be paid in. That Henry Ibbotson owns, or pretends to own, 396 shares, Francis P. Schoals 288 shares; that Luther Loomis has standing in his name 40 shares; that Robert Van Renselaer claims 90 shares, Jared N. Stebbins 70 shares, and William Packer one share; that other shares must be out, but in whose hands the complainant is ignorant, and has no means of ascertaining. That the first election for directors took place February 1st, 1839, and that other elections have been held from time to time, and that John I. Gaston, Robert Van Renselaer, Jared N. Stebbins, William Packer and Henry Ibbotson are now, or were lately, directors, and were elected on the 29th of March, 1842. That in the fall of 1839 the company commenced preparations to erect buildings; and that they have obtained the title to about three acres of land, and erected thereon a stone factory 100 feet long and 36 wide, and three stories high, a stone foundry and stone machine shop, at a cost, with wheels, castings and gearings, of upwards of \$10,000; and have purchased a valuable patent right for manufacturing screws, and costly machinery, at an expense of upwards of \$150,000; all which property, real and personal, except about \$5000, was in the possession of the company and owned by them, till about October 15th, 1842, when it was taken possession of by Luther Loomis and Samuel P. Lyman, under a pretended conveyance and bill of sale to them by the company, or some of the directors thereof. That the complainant sued the company at the term of June, 1843, of the Circuit Court of Somerset, and recovered judgment against them for \$840.81 debt, and

---

Smith v. Loomis et al.

---

\$32.10 costs, and caused execution to be issued against the goods and lands of the company, and placed in the hands of the sheriff of Somerset, on the 29th of August, 1843, by virtue of which the sheriff levied on all the real and personal estate above mentioned, as belonging to the company, subject to all prior legal claims.

That previous to the completion of the said improvements the company became embarrassed, and Loomis and Lyman, being aware of it, and desiring to get possession and control of the works, in August or September, 1842, made a proposal to Ibbotson and to some persons unknown to the complainant, that if they would sell to them, Loomis and Lyman, the property of the company for a nominal value, or allow them to become the purchasers thereof at a public sale, they would hold the property in trust, one-half for themselves, Loomis and Lyman, and the other half for the individuals to whom said offer was made.

That Gaston, Stebbins, Van Renselaer and Packer, in violation of their trust as directors, did, without any resolution of the board of directors, and without any meeting of the board for the purpose, and to defraud the complainant and other creditors of the company, and a portion of the stockholders of the company, on or about the 3d of October, 1842, fraudulently, by articles of that date, made and executed between the said John I. Gaston, Stebbins, Van Renselaer and Packer, of the first part, and Luther Loomis and Samuel P. Lyman, of the second part, on a pretended consideration of \$3000, acknowledged in said articles to have been received by the said parties of the first part in behalf of said company, sell and transfer to Loomis and Lyman the said letters patent and all the personal property of the company; and that thereupon, Gaston, Stebbins, Van Renselaer and Packer, or some of them, delivered the said property to Loomis and Lyman, who are now in the wrongful possession thereof as the pretended owners. That said sale was made without any authority, and in violation of their duty as directors, on a mere pretended consideration, which Loomis and Lyman never paid or secured a cent of; and that it was the understanding between the parties that they were not to pay any part of it, but that they should hold the property in trust,

one-half for themselves, and the other half for the said parties of the first part, and some other individuals connected with them in the attempt to get the property out of the control of the said "The Somerville Manufacturing Company," without paying any consideration for it. That, in pursuance of this design, at an irregular meeting of some of the directors at the Merchants' Hotel, New York, on the 15th of October, 1842, at which meeting were present Gaston, Van Renselaer, Packer, and Henry Ibbotson, it was resolved, by the votes of Gaston, Van Renselaer, and Packer, that all the real estate of the company should be conveyed to the said Loomis and Lyman; and Gaston was, by the said resolution, directed, as president, to execute a deed thereof accordingly; which said resolution was voted for by all the said directors present, except Ibbotson, who protested against it as a fraud on the creditors and stockholders, and a violation of the trust reposed in them as directors, and because all the directors had not been notified of the meeting, and were not all present. The bill charges that said meeting was not a lawful meeting of the board of directors, and was incapable of doing any valid corporate act; that no sum was stated in the resolution as a consideration, but that it was stated in the resolution that the conveyance should be made according to the terms of the arrangement theretofore made with Loomis and Lyman; but the complainant charges that no terms of arrangement had ever been made between said directors and Loomis and Lyman, but that the terms there referred to were the same terms before stated to have been proposed by Loomis and Lyman to Ibbotson and other persons unknown to complainant. That, in consequence of said pretended resolution, and without any other authority, Gaston, as president of the company, made, executed, and delivered to Loomis and Lyman a deed for all the real estate of the company, dated October 18th, 1842, and acknowledged the same day. That no money was paid or secured, or intended to be; but that the conveyance was made to, and that the estate thereby granted is now held by Loomis and Lyman, under some understanding between them and Gaston, Van Renselaer, Stebbins, and Packer, or some of them, that the property shall be held in trust for them, and for their benefit, and without any agreement, understanding, or intention that



---

Smith v. Loomis et al.

---

the company or its creditors, is or are ever to be paid anything for the property, or on account of their debts.

That, at a meeting of only three of the directors, on the 4th of October, 1842, at which Gaston, Packer, and Stebbins were present, it was resolved, under pretence of securing money to be loaned by Joshua Doughty to the company, that Gaston, the president, should execute a bond to Doughty, conditioned for the payment of \$1176, to be loaned by Doughty to the company; to pay Gaston \$860, which he pretended he had loaned to the company, and to pay two notes said to have been given to Packer, and \$100 of sundry small debts pretended to be owing by the company; and a warrant of attorney to confess judgment on said bond. That Gaston, by virtue of said resolution of a mere quorum, passed by the votes of Gaston and Packer, the persons to be benefited by the judgment, did execute such bond and warrant, and that, on the same day, judgment was entered thereon, in favor of Doughty against the company. That Doughty had not, nor has he since, paid a cent to the company, or to any other person for them, but that, to give some color to the transaction, and as a pretext for the affidavit of indebtedness he was obliged to make, Doughty, when the bond and warrant were delivered to him, made his note to the company for \$1076, dated the same day, and delivered it to Gaston, and immediately after making his affidavit, received back the note, and destroyed it, or put it in his pocket, remarking that he was not going to have that note out against him, or words to that effect. That the company were not then indebted to Gaston in any way, but that Gaston was then largely indebted to the company; that he was a subscriber for one hundred shares of the stock of the company, the par value of which was \$10,000; that the whole par value had been called in, and that he had only paid in on said stock from \$500 to \$800; that the obtaining the said judgment was a contrivance of his, to get back the money he had paid on the stock subscribed for by him; that, notwithstanding Loomis and Lyman were informed of all the circumstances under which the said judgment was confessed, and knew it was fraudulent, and Lyman admitted it was so, and that it ought to be set aside, yet that Loomis and Lyman procured an assignment of it to them from Doughty.

---

Smith v. Loomis et al.

---

That a *fi. fa.* has been issued on said judgment, and that the sheriff of Somerset, by virtue thereof, has levied on all the real estate of the company, and also on all the personal property of the company now in the possession of said Loomis and Lyman, as hereinbefore stated, and has advertised the same for sale on the 9th of September, 1844.

The bill charges not only that the said sales of all the real and personal property of the company to Loomis and Lyman are fraudulent and in breach of trust, but that the said directors had no authority to sell all the real and personal estate of the company, or so much thereof as to prevent the company from carrying on the business for which it was incorporated. That all the property of the company is included in the said transfers to Loomis and Lyman, and that if the said transfers are to prevail as valid, the complainant must lose the whole of his judgment. The bill then states several judgments obtained against the company ; one by the State Bank at Elizabeth, October 4th, 1842, for \$672.21 ; one by Henry Ibbotson, October 24th, 1842, for \$595 ; one by Ovrick, Grubbs and Parker, November 8th, 1842, for \$345 ; one by B. Hunt, June 20th, 1843, for \$387 ; on which three last-mentioned judgments executions were issued to the sheriff of Somerset.

The bill charges an arrangement between Gaston, Van Rensselaer, Stebbins, Packer, Loomis and Lyman, and Doughty, or some of them, that the said property so advertised to be sold as the property of the company, by virtue of the Doughty execution, should, at the sale, be bought by Loomis and Lyman in trust, and under the agreement and arrangement under which, as before stated, the conveyance of the property was made to them ; that they, knowing the conveyance to be fraudulent and void, have contrived this method of having the property sold by virtue of the judgment and execution of Doughty, themselves to become the purchasers, well knowing that no person will bid for the property while they set up a claim as owners thereof, by virtue of a conveyance prior in point of time to the said judgment ; all which the complainant charges as fraudulent—as being an attempt to purchase what they already claim to be their own property, at their own sale. That Loomis and Ly-

---

Smith v. Loomis et al.

---

man, in preparing their plan, have already publicly declared that they are the owners of the property, and that no purchaser at the sheriff's sale can reap any benefit from his purchase.

The Somerville Manufacturing Company, John I. Gaston, Robert Van Renselaer, Jared N. Stebbins, William Packer, Luther Loomis, Samuel P. Lyman, Henry Ibbotson, Francis P. Schoals, Joshua Doughty, and the other judgment creditors, and David T. Talmage, sheriff, are made defendants. The prayer of the bill is, that the bill of sale of the personal estate, and the conveyance of the real estate, to Loomis and Lyman, may be set aside; that all the property of the company received or obtained by Loomis and Lyman by virtue of the said pretended purchase, be given up to the company, for the benefit of the company and its creditors; that Loomis and Lyman may be charged with the rents, issues and profits of the property, and for the use and occupation thereof, and may be decreed to pay the same to the company, for the benefit of the creditors of the company, or may be decreed to pay the complainant the amount of his said judgment against the company; that the trusts under the said act of incorporation may be carried into execution; that the judgment and execution in favor of Doughty may be declared fraudulent and void as against the company, or as against the complainant's said judgment; and that Doughty, Loomis and Lyman, and the sheriff, may be enjoined from all further proceedings on the judgment and execution in favor of Doughty, against the company.

An injunction was granted, according to the prayer of the bill.

The defendants Luther Loomis and Samuel P. Lyman, and the defendant Joshua Doughty, have answered; the other defendants have not answered. The answer of Loomis and Lyman is of great length and particularity, but as the contents and character of the answers appear sufficiently in the opinion of the court, an abstract of them is not here given.

The cause was heard on a motion to dissolve the injunction.

*S. P. Lyman* and *G. D. Wall*, for the motion.

*B. Williamson* and *Reading*, *contra*.



---

Smith v. Loomis et al.

---

THE CHANCELLOR. On the 1st of March, 1837, "The Somerville Manufacturing Company" was incorporated. The charter provides for the election of five directors, who should be stockholders, and should hold their office for one year and till others should be elected, and that the directors should choose a president out of their own number. On the 29th of March, 1842, John I. Gaston, Robert Van Renselaer, Jared N. Stebbins, William Packer and Henry Ibbotson were elected directors, and no others have been since elected directors. The company obtained the title to about three acres of land, and erected buildings thereon, at a cost, with wheels, castings and gearings, of upwards of ten thousand dollars, as charged in the bill, of upwards of five thousand dollars, as stated in the answer of Loomis and Lyman, two of the defendants; and bought certain patent rights and a quantity of machinery, at an expense of \$150,000, paid for in stock of the company; which property was in the possession of the company in September, 1842. On or about the first of October, 1842, Van Renselaer and Stebbins, two of the directors, and Loomis and Lyman, and two other stockholders, entered into an agreement in writing, dated October 3d, 1842, purporting to be a memorandum of an agreement between Loomis and Lyman, two of the stockholders, of the one part, and the said Stebbins, Ibbotson, Van Renselaer, and two other stockholders, of the other part, to be binding on those only of the said persons named who should sign it, reciting that the affairs of the company had been long so embarrassed that its property could not be made productive, and must be sold to meet its liabilities; that the parties to the memorandum are holders of a large amount of the stock of the company, and have expended large sums to make its property productive; that it had become necessary that further sums be expended to save what had been laid out from total loss; that it was the intention of the parties to the memorandum to afford an opportunity to other parties who claim to have an equitable interest in the property, if they should wish to protect such interest, to make advances, *pro ratâ*, which should be equal to the expenditures made by the parties named in said memorandum, in order that they, on making such advances, might share with the parties named in the memorandum, in

---

Smith v. Loomis et al.

---

the benefits or disadvantages to accrue from what had been undertaken by the parties named in the memorandum; and providing that it was therefore agreed by and between the parties to the memorandum as follows:

1st. At any sale of said property which might take place under any execution or decree against it, or at a private sale, assignment or transfer by the managers of the company, the said property of every description, should be bought by Loomis and Lyman, for the parties who should subscribe the memorandum, at the lowest price and on the most advantageous terms possible, provided the price of the whole of the property should not exceed the sum which Loomis and Lyman might be willing and ready to pay for the same; which property, when purchased, should be held by them for the benefit of the said Loomis and Lyman, and the others who should become parties to the memorandum by signing their names thereto, in the following proportions, viz., Loomis and Lyman should have six-twelfths, and the other parties thereto also six-twelfths; that each one should pay, *pro ratâ*, for the purchase of the property, according to his respective interest in the same, to be thereafter declared.

2d. That immediately after the execution of the memorandum, the parties should proceed to inventory all the effects of the company, and have the same appraised by competent and disinterested persons, so that the value thereof might be known to the parties.

3d. That as soon as the property and effects could be obtained, and the title thereto perfected, for the benefit of the parties to the memorandum, a lease for the requisite water-power should be obtained from the Somerville Water-power Company, on the usual terms, at the rate of four dollars per annum for each square inch.

4th. That the title to the property, under the sale contemplated, should be acquired as soon as the same could be done consistent with the interest of the said parties, and without doing violence to the rights of others.

5th. That simultaneously with the steps therein agreed to be taken, steps should be taken to clean up and put in order all the machinery and effects of the company, and

prepare the same for use, as soon as the circumstances should permit.

6th. That, as soon as said purchases should be made, and the value of the same ascertained, articles of agreement more full, and defining the rights of the parties more particularly, should be made out and entered into between the parties, but that, until then, the said memorandum should be binding.

This memorandum was, or purported to be signed by or in behalf of the directors and stockholders among whom the arrangement was concluded on, except Ibbotson, a director and stockholder, who, it appears, refused to sign it.

On the 3d of October, 1842, another writing was made, the substance of which is as follows: "Agreement made, &c., October 3d, 1842, between J. N. Stebbins, Henry Ibbotson, Robert Van Renselaer, William Packer, and John I. Gaston, managers or directors of the Somerville Manufacturing Company, duly elected under the charter of the said company, of the first part, and Luther Loomis and Samuel P. Lyman, of the second part, witnesseth, that the party of the first part, for \$3000 in hand paid by the parties of the second part, the receipt whereof is acknowledged in behalf of the company, have sold, &c., all and singular the letters patent, &c., and all and singular the right, title, and interest of the company, and of the parties of the first part, in the property and effects of the company described in a deed, a copy of which is annexed to said agreement, consisting of machinery, &c., chattels, and effects, of whatever name or nature, belonging to the company, to have and to hold to the said Luther Loomis and Samuel P. Lyman, free and clear of all encumbrances whatever. Given under the hands and seals of the parties of the first part, the day and year first above written, and to take effect as soon as a majority of the above named persons have hereunto subscribed their respective names." This writing is executed under the individual hands and seals of four of the five persons therein named, as parties thereto of the first part. Ibbotson, the other person named as of the first part, did not execute it.

The deed annexed to the said writing, and referred to in it, is a deed from the Poughkeepsie Screw Manufacturing Company to the Somerville Manufacturing Company, of certain patents and machinery, steam engines, materials, lathes, tools, and chattels.



---

Smith v. Loomis et al.

---

On or before the date of the said writing under the hands and seals of the said Van Renselaer, Stebbins, Packer, and Gaston, the property and effects mentioned therein were delivered by them, or some or one of them, to Loomis and Lyman; and they, in their answer, claim to hold the same under that writing. The bill charges that no part of the consideration mentioned in said agreement was ever paid by Loomis and Lyman, or secured in any way, and that it was the understanding between the parties to the said writing, that they were not to pay any part of it, but that they should hold the property in trust, one-half for themselves, and one-half for the said parties of the first part and some other individuals connected with them.

On the 4th of October, 1842, a judgment was confessed, or entered by way of confession, against the company, in favor of Joshua Doughty, for \$1176, and a *fi. fa.* was issued thereon and levied on all the property of the company, real and personal. On the same day a judgment was confessed against the company to the State Bank at Elizabeth, for \$672.21.

On the 15th of October, 1842, at a meeting of some of the directors, in the city of New York, at which meeting Gaston, Van Renselaer, Packer, and Ibbotson were present, it was resolved, by the votes of Gaston, Van Renselaer, and Packer, that all the real estate of the company be conveyed to Loomis and Lyman, and that Gaston, the president, execute a deed thereof; Ibbotson protesting against said resolution; and Gaston, on or about the 18th of October, 1842, executed, acknowledged, and delivered to Loomis and Lyman a deed for all the real estate of the company, for a consideration therein mentioned, of \$3000, the receipt whereof is, in the deed, acknowledged, subject to two certain liens by judgment and execution against the company—one in favor of Joshua Doughty, and one in favor of the State Bank at Elizabeth.

The bill charges that, though \$3000 was mentioned in said deed as the consideration, yet that no money was paid or secured, or intended to be; but that the conveyance was made to, and the estate thereby granted is now held by Loomis and Lyman, under some understanding between them and Gaston, Van Renselaer, Stebbins, and Packer, or some of them, that

the said property shall be held in trust for them and for their benefit, and without any agreement, understanding or intention that the company is ever to be paid anything for the property, or its creditors anything on account of their debts.

The bill states particularly the circumstances by reason of which the complainant insists that the judgment confessed by the company to Doughty, and assigned by him to Loomis and Lyman, is fraudulent; and the answers of Loomis and Lyman and Doughty give their account of that judgment, and claim that it is good. But as the conclusion I have come to on the present motion to dissolve the injunction, is not founded on the validity or invalidity of that judgment, I have not thought fit to state fully the facts in reference to it. The decision to be made on this motion, is founded on the account given in the answer of Loomis and Lyman of the circumstances under which they claim to be the owners of all the property of the company, and on the manner in which the answer gives that account, and on the nature of the arrangement made in reference to the property by and between the parties to the memorandum before alluded to. [The Chancellor here stated the charges in the bill as to the nature of the arrangement.]

Let us see what answer Loomis and Lyman give to these charges. They admit that previous to the completion of their improvements, the company became embarrassed, &c., but deny that they, these defendants, "being aware, &c., (as in the bill,) and being desirous, &c., (as in the bill,) and supposing, &c., (as in the bill,) would hold said property in trust, the one-half for themselves, and the other half for the other individuals to whom the said offer was made," following literally the language of the bill, and departing from the well-settled rule of answering, that the *substance* of a charge must be answered or denied, and that a mere literal answer is insufficient; a departure which occurs in several portions of the answer. They proceed to say that the equitable interest they held in the property of the company, was equal to the value of half the said property, as it was then situated. They then state that the company was embarrassed and had no water power, nor lease for any, nor any power to propel machinery, and was largely indebted for work and materials; that the efforts which

---

Smith v. Loomis et al.

---

had been made to carry into effect the objects of the charter had entirely ceased, and the property was going to ruin ; that the company had no property or means whatever, except the property aforesaid, to pay its debts, or complete the buildings, or obtain water, or put the works in operation ; that though other names appear on the books as stockholders, yet that, in fact and in equity, the interest in the property of the company belonged to them, Loomis and Lyman, and Van Renselaer and the said two other stockholders, not naming Ibbotson, and that all other parties nominally interested in the company, except Stebbins, who acted as agent of the company, had long since, to all intents and purposes, abandoned it and neglected and refused to do anything, or make advances for completing the building, or procuring water power, or putting the works in operation, or paying for what had already been done towards either of these objects. That they have no knowledge, information or belief that any of the nominal or pretended stockholders, except the parties last above mentioned, ever paid one cent for or on account of the company since it was chartered, organized and established at Somerville, towards any of the objects aforesaid ; that they, Loomis and Lyman, Ibbotson, Stebbins, Van Renselaer and the said two other stockholders, the parties, as they say, interested in and claiming to be the owners, in fact and in equity, of the whole of the stock and property of the company as aforesaid, on the 1st of October, 1842, concluded a general arrangement for the purpose of paying the debts then owing by the company, for the purpose of procuring a water power, and for the purpose of completing the buildings and machinery and putting the same in operation, and rendering its effects valuable to those who were the owners thereof, after a full consultation among themselves, and with those who were *the* creditors of said company. [How is it that the word "the," before "creditors," is introduced in the last sentence ; it is a word of great force in the connection in which it stands, and if they mean to say only "with creditors of the company," who were those creditors?]

They further say that as part of the arrangement, it was agreed by the parties aforesaid, that the \$3000 consideration money should be paid and applied directly on account of the company to the creditors thereof, and that they should pay,



---

Smith v. Loomis et al.

---

out of the net earnings of the six-twelfths so held by them in trust for said Stebbins, Van Renselaer and others concerned in said arrangement, after paying the costs of completing and putting the works in operation, a further sum sufficient to pay off and satisfy the remaining debts of the company, and that they, Loomis and Lyman, should put the machinery in operation and make it productive as soon as circumstances would permit; that pursuant to said arrangement and the conveyances and agreements aforesaid, the property was delivered to them, and they took possession thereof on the 1st of October, 1842, and have held it ever since.

They then say that in pursuance of said arrangements they have expended, in putting up the buildings, procuring water-power and putting the machinery in operation, upwards of \$12,000; that at the time they bought the property and made the agreements and arrangements aforesaid, situated as it was, and without the right to a water-power, had it been sold under execution, or at any absolute sale, unaccompanied with any arrangement for fitting it up and using it in connection with water-power, the property would not have brought enough to pay the debts of the company; and that they knew of no other arrangement which it was in their power to make, whereby so much could be realized, either for the creditors or the stockholders, as by the arrangement and agreement set forth. They deny that the consideration of \$3000 was a pretended consideration, and that it was the understanding that they were not to pay it; but aver that the said consideration was *bona fide*, and that it was expressly agreed that these defendants should pay the same and every part thereof, "*as in said answer before set forth.*"

It is not alleged in any previous or subsequent part of the answer that they ever paid, or secured, or promised or intended to pay the consideration, or any part of it, in the way consideration money is usually paid or secured; and yet the frame of this clause of the answer looks very much as if they would have it understood as an averment that they were to pay the consideration in the usual way.

They then go on and aver that the prominent objects the managers had in view were, to realize sufficient to pay the

---

Smith v. Loomis et al.

---

debts of the company, to put the works in operation, and to save the property from the sacrifices which, they say, would have been unavoidably made without the arrangement which they did make, "*as herein before set forth.*" How these two last prominent objects might be promoted by the arrangement, we may in some measure comprehend; but how the other object stated as prominent, that of realizing sufficient to pay the debts of the company, was to be attained by the arrangement, it is difficult to perceive. It is easy to see that there is nothing in all this opposed to the truth of the charge in the bill, that no part of the said consideration money was ever paid or secured to the company, or intended to be, and that no part of it has been or was intended to be paid to the creditors of the company.

There is one part of the answer which seems to approach very nearly to an answer to the charge; but on close examination, it will be found to break the promise to the hope. It is that part which says, "That as part of the arrangement aforesaid, it was agreed by the parties aforesaid, that the said \$3000, the consideration for the sale of the said property, mentioned and set forth in the said agreement, and acknowledged to have been received from the said defendants by the managers, should be paid and applied directly on account of the said company to the creditors; and it was also agreed that the said defendants should pay, out of the net earnings of the said six-twelfths so held in trust by them as aforesaid for the said Van Renselaer, Stebbins, &c., (naming the others interested in the arrangement,) after paying the costs of completing and putting the same in operation, a further sum sufficient to pay off and satisfy the remaining debts owing by the company; and it was also agreed that the said defendants should put the said machinery into operation and make the same productive as soon as circumstances would permit."

It is evident that these defendants felt the force of the charge and the importance of giving it an answer. Is the answer such as should be satisfactory to the court? I think not. Was the consideration money, or any part of it, paid? If it had been, it would no doubt have been so stated in the answer; for they have thought it worth their while to say "that it was acknowledged (that is, in the deed) to have been received from them

by the managers." Was it secured to be paid? If so, was any time fixed for its payment? To whom was it to be paid? No answer is given to any of these inquiries. But it is said it was agreed by the parties to the arrangement—themselves being parties to it—that it should be paid. How, and to whom? The answer says it was agreed that it should be paid and applied directly on account of said company to the creditors. By whom was it to be so paid and applied? By themselves? The answer does not say so. Was it to be to any particular creditor, or to all the creditors *pro ratâ*? Again, how was it *agreed* to be paid. What evidence is there of an agreement to pay? No such agreement appears in any of the writings. The memorandum says that the property, when purchased by them, shall be held by them for their benefit and that of the other parties to the memorandum, half for them and half for the others, and that each should pay, *pro ratâ*, for the purchase of the property, according to his respective interest in the same, to be thereafter declared. To whom was each to pay his share? The answer says it was agreed that the consideration money should be paid and applied directly *to the creditors*. Are these defendants, Loomis and Lyman, or any or either of the parties to the memorandum, personally liable to the creditors, or any of them? The title of the property is to be taken out of the company, no part of the purchase money is to be paid to the company, the property is to be removed from the reach of the creditors, and, at the same time, the parties to the memorandum are not to be personally liable to any creditor. If this is not the arrangement, the company, or those who acted for it, should have put in their answer to show the court what it was. Indeed, it is an objection to the dissolution of the injunction, that the company, or those who acted for it, have not answered, for, certainly, the *gravamen* of the bill rests partly on them. If this is the arrangement, it cannot receive the sanction of this court.

There is another rule for answering, which, as it seems to me, has been departed from in this answer. It is this: Where a matter is charged in the bill which must, if true, be within the knowledge of the defendant, the substance of the charge should be answered directly, not evasively, nor by way of negative pregnant. And I must be permitted to add, that where the



---

Smith v. Loomis et al.

---

circumstances charged are suspicious, or have the appearance of collusion and fraud, a defendant must be held to strict rule in answering.

There is one view of the subject, on which, if it be the true view, it might be thought the injunction should be dissolved. I am not satisfied that the instrument transferring, or purporting to transfer the personal property of the company, executed under the hands and seals of four of the directors, and the resolutions mentioned in the answer, as afterwards made by the managers, or some of them, approving the transfer, are sufficient to transfer the property; and, if the personal property still belongs to the company, it may be asked, why not dissolve the injunction as to the personal property, and let the execution at law sell it as the property of the company? The answer is, the party moving for the dissolution do not ask it on that ground. They claim the property as theirs. It may be said that the sale enjoined was a sale about to be made on a judgment at law assigned to Loomis and Lyman. The answer is, if they acquired the title to the property, and then bought a judgment at law which was a lien on the property, they relieve the property from the lien of the judgment. It would be a singular proceeding to sell their own property to pay a judgment of which they had procured an assignment to themselves. If the property is theirs already, they cannot be injured by an injunction against selling it under the judgment; and if they claim the property as theirs, and as not subject to the judgment, is it likely that any person besides themselves would be willing to bid for the property and pay its value, at a sale under that judgment, and take their chance of recovering it or its value from Loomis and Lyman, in opposition to their assertion and claim of title in them prior to the judgment? This renders it unnecessary for me to look, at this time, into the transaction in reference to the Doughty judgment.

In my view of the case, as it stands upon the bill and answer, the injunction should be retained till the hearing of the case on the proofs.

Motion denied.

## JOHN B. BULLOCK v. BENJAMIN ZILLEY, SURVIVING EXECUTOR OF JOHN BUTCHER, ET AL.

The complainant filed his bill for his proportion of the interest of a surplus in the hands of an executor, and made his brothers and sisters, who are entitled to equal portions of the interest, (if the complainant's claim for interest is good,) defendants. They answered the bill, submitting their rights to the protection and judgment of the court. Pending the suit, the person at whose death the principal was to be distributed among the complainant and his brothers and sisters, died; and thereupon the complainant settled with the executor. No decree had been made in the cause. The complainant was permitted to discontinue the suit.

---

John Butcher, late of the county of Burlington, died February 7th, 1818, leaving a will, by which he devised and bequeathed to Thomas Butcher, since deceased, and the defendant Benjamin Zilley, whom he also appointed executors of his will, all his estate, real and personal, in trust, that they, or the survivor of them, should sell the same, and put the proceeds at interest. The will directs the said executors and trustees, and the survivor of them, to pay the interest, in their discretion, to the support and maintenance of his nephew Thomas Bullock and his family, including the complainant, for and during the natural life of the said Thomas; and at his death to divide the principal equally among the children of the said Thomas, including the complainant, who may then be living. Thomas Butcher died January 1st, 1828. Five children of Thomas Bullock, besides the complainant, are still living, namely, Margaret Bullock, Amos Bullock, Thomas Bullock, Elizabeth, wife of John H. Cook, and Ann, wife of Turner Risdon. Rebecca, the wife of Thomas Bullock, died July 10th, 1839. The defendant Benjamin Zilley, surviving executor, has in his hands the whole of the surplus of the estate of the testator, after paying the debts.

The bill was filed April 5th, 1842, in the lifetime of Thomas Bullock, and states that the complainant had formed no part of the family since he attained the age of sixteen, and prays that the defendant Zilley may be decreed to account with him, and

---

Bullock v. Zilley et al.

---

that the said surplus may be applied in a course of administration, agreeably to the directions of the will ; and that the complainant may be paid his proportion of the annual interest, or such portion thereof as may be necessary to his support, or he shall appear to be justly entitled to under the directions of the said will.

The other children, with the husbands of the married sisters, and Thomas Bullock, are made defendants.

Zilley, the surviving executor, and Thomas Bullock, two of the defendants, put in their joint and several answer. This answer states that all the interest of the said principal sum so invested has been paid, annually, to the support and maintenance of the said Thomas Bullock and his family, including the complainant ; and claims that, by the true construction of the will, the interest has been properly paid.

In May, 1844, after all the testimony had been taken in the cause, the other children of Thomas Bullock put in their answers. Margaret Bullock answers separately ; and after admitting, &c., says that, some time in September, 1828, she was put out to one Amos Bullock, and that she returned to her father in the spring of 1842, and that she is ignorant what share or portion of the said balance she is entitled to, or what sums have been paid to her or for her use, either by her father or by the said Benjamin Zilley ; but that she is willing to abide by their account thereof, and she submits her rights under the will to the judgment of the court.

The other children, with the husbands of the married daughters, put in their joint and several answer ; one of them, being an infant, answering by his guardian. This answer, after admitting, &c., states that, in September, 1828, the family of Thomas Bullock was broken up, and his children were put out to different persons. That the defendant Elizabeth Cook left her father's family in the fall of 1828, and did not return till January, 1841, when she remained eleven months, paying for her board by her labor ; that she had a bureau, clothes, and goods, of the value of \$129, which she believes were paid for or furnished by her father, and also \$100 in cash, received of Zilley. That the defendant Ann Risdon has received from her father \$160 in cash, and received, at suu-



---

Bullock v. Zilley et al.

---

dry times, dresses, bedding, &c., to the amount of \$66.50 ; and that her father paid for her board and schooling, while she was with Caleb Sykes, \$34. That all these defendants are willing that whatever may have been received by them should be allowed out of any share of the said balance to which they, respectively, may be entitled, and submit their rights to the judgment of the court, and hope that whatever rights they, respectively, have under the said will, may be protected and secured to them. This answer asks that the trust fund, in whose hands soever it may be, to which they are not immediately entitled, may be invested, under the direction of the court, according to the intent and meaning of the said will ; and says that these defendants, since the 11th of February, 1829, have received but trifling sums of interest on the said balance, except what is before stated, and have supported themselves, or been supported by the persons with whom they were living, with little, if any, expense to their father.

The defendant Thomas Bullock, Jr., who answers by his guardian, says he is an infant under twenty-one, and claims such interest under the said will, and in the said balance, as he is entitled to, and submits his interests to the protection of the court.

The father, Thomas Bullock, died in March, 1845, and in this position of things Zilley, the surviving executor and principal defendant, settled with the complainant his whole claim, and took his receipt therefor, and the court is now moved to allow the bill to be dismissed.

*W. L. Dayton*, for the motion.

*G. D. Wall* and *P. D. Vroom*, *contra*. It is a bill for a share of surplus, and the co-legatees were made defendants. All must be made parties, either plaintiffs or defendants. The defendants have answered. The rule, they apprehend, is settled. 2 *Sim. and Stuart* 219.

There are two modes of proceeding ; one co-legatee or co-distributee may file a bill for himself, and for others who will come in and contribute. In this case, he controls the suit until decree. The other mode is, to make his co-distributees de-

---

Bullock v. Zilley et al.

---

fendants, and if they come in and answer, the complainant, they contend, loses the control. The other defendants have set up their claim, and cannot file a bill. The case stands on the footing on which it would stand under the first mode after a decree. Can the executor, after the answers are in, settle with the complainant? and can the complainant, after the answers are in, withdraw the suit? The way is, to permit the defendants to proceed in the name of the complainant.

*Mr. Dayton*, in reply. The argument on the other side shows he is correct. What is the principle applying to the case? The gentlemen on the other side have given the rule. It is this: after a decree settling the whole case, the defendants may prosecute the decree, because they cannot then file a bill. But if on dismissal the defendants can file a bill in their own behalf, there is no reason why the complainant should not be permitted to withdraw his suit. The bill was filed before the death of Thomas Bullock, and could not call for anything more than a share of the interest. The situation of the parties is now such, since the death of the father, Thomas Bullock, that the other co-distributees will be obliged to file a bill for their share of the principal, if they can make no settlement with the executor. The dismissal, therefore, will not involve them in additional expense. He cited *Hoff. Ch. Pr.* 327; 2 *Smith's Ch. Pr.* 311-12.

**THE CHANCELLOR.** To avoid multiplicity of suits, one person is allowed to file a bill on behalf of himself and all others in the same interest who may choose to come in and claim relief by and contribute to the expense of the suit. In such case, the decree provides for the rights, not only of the complainant, but of all others who come in to take the benefit of it; and, therefore, the complainant cannot, after the decree, dismiss his bill. I do not think the present case is within this principle. The complainant filed his bill for his proportion of the interest of the surplus in the hands of the executor, and made the other children, who are entitled to equal proportions of the interest, (if the complainant's claim for interest is good,) defendants. They answered the bill, admitting they had received certain

---

Washer v. Brown.

---

amounts, and submitting their rights to the protection and judgment of the court. Pending the suit, the father, on whose death the children became entitled to have the principal distributed among them, died. No decree had been made in the suit, and the complainant thereupon settled with the executor, and gave a receipt for his share, both of principal and interest. I know of no rule which forbids permitting him to withdraw his suit.

Let the bill be dismissed.

---

---

GEORGE WASHER AND DANIEL WASHER v. JAMES BROWN.

1. A, who was keeping a tavern and occupying a house and lands on one side of the road, and a small strip on the other side, on which were a well and stables used by him for the purposes of the tavern, agreed to sell the premises to B, knowing that B desired to purchase them for the purpose of keeping a tavern there, and represented to B that his title covered the strip on which were the well and stables. A did not own the strip. Under this representation B entered into articles of agreement for the purchase. An injunction was granted staying the further prosecution of an action at law, brought by A against B, for not complying with the articles, though the deed to A, which was referred to in the articles as containing a description of the premises, was on the table when the articles were drawn, in the presence of B; the bill alleging that B, confiding in the representations of A, did not examine the deed.

2. But on the coming in of the answer, positively denying the allegations on which the complainant's equity rested, the injunction was dissolved.

3. It was said by the Chancellor, that a purchaser for full value is entitled to have an encumbrance removed, by the application to that purpose of a sufficient portion of the purchase money.

---

The bill in this case, filed April 19th, 1845, states that about December 26th, 1843, the complainant, Daniel Washer, being desirous to purchase a house and lot suitable for keeping a tavern, and the complainant, George Washer, the father of said Daniel, being willing to assist the said Daniel therein, the complainants opened a negotiation with James Brown, the defendant, for the purchase of a lot of land of about six acres, with a dwelling-house and other improvements thereon, then occupied



---

Washer v. Brown.

---

by him as a tavern. That on that day the defendant, at the request of the complainants, who were strangers in that vicinity, pointed out and described to them the premises, and represented them as consisting of about six acres, situated on both sides of the turnpike road leading from Paterson to Hamburg, on the northerly side of which road was the tavern-house and the principal part of the land; and on the southerly side a narrow strip of land, about two chains long and thirty feet wide, not enclosed by any fence, on which was a well of water and a shed or barn about forty feet long by twenty-four feet wide, with stalls and a mow, used for stabling and for storing hay for the purposes of the tavern. That after viewing the premises so pointed out and described to them, the complainants concluded they would suit their purposes, and offered to buy the same. That Brown asked 1600 dollars, and complainants offered 1400 dollars, and Brown agreed to take it—500 dollars to be paid when the deed should be delivered, and the residue in two equal annual payments; the defendant to execute a good and sufficient deed on or before April 1st, 1844. That after the price was agreed upon, the defendant remarked to the complainants that he did not want to take advantage of them; that there was a mortgage on the premises for 1000 dollars, but that the holder of the mortgage was willing it should remain, if the interest was paid, for two or more years, and that there was no other encumbrance on the lot. That the complainants, confiding in the defendant's representations as to the description of the premises and the encumbrances thereon, consented that articles of sale and purchase should be drawn and executed forthwith, without taking time to examine the record to ascertain the title of the defendant, or the encumbrances on the premises. That articles were accordingly prepared and executed on the said 26th of December, 1843. The articles recite that the defendant had sold, and that the complainants had purchased from him, the tract of land and premises lying in the township of Manchester aforesaid, containing six acres, strict measure, particularly described in a deed from Harriet Merselis to the defendant, dated March 11th, 1841, recorded, &c., subject to a mortgage from the defendant to the said Harriet for 1000 dollars; and then provides that Brown agrees to execute a good and suf-

---

Washer v. Brown.

---

ficient deed of conveyance for the said tract of land and premises, on or before April 1st, 1844, and to deliver possession of the premises on the 17th of April, 1844, and that the Washers agree to pay Brown for the premises, \$1400, as follows: \$500 on the delivery of the deed, and the balance of the purchase money in two equal yearly payments thereafter.

The bill states that the complainants did not examine the deed referred to in the said articles, but that, trusting to the representations of Brown, they supposed the same conveyed all the premises shown to them by Brown. That, therefore, on the same day, the complainants paid on the said articles of agreement, \$10. That before the day fixed for the delivery of the deed, the complainants, to their great surprise, ascertained that a part of the premises for which they had bargained, that is to say, the part on which were the well and shed aforesaid, were not embraced in the said article, and that Brown had no title thereto, and that the complainants had been grossly deceived by Brown's representations in relation to the premises. That the premises, without the said strip of land, being entirely unsuitable for the keeping of a tavern, the purpose for which they were intended to be used, and being worth not more than \$1000 for any other purpose, the complainants wrote a letter to Brown, to the effect that they had been grossly deceived in the matter by his false representations, and that the premises were not truly shown and described to them by him, and therefore declining to carry into effect the said agreement—which letter the complainants caused to be delivered to Brown, on or about January 20th, 1844. That on or about February 7th, 1844, Brown, in company with one Samuel Ryerson, came to the house of the complainant George, and tendered to the complainants a writing which he alleged to be a deed of the premises, and demanded the residue of the first payment. That the said deed did not include the land on which were the well and shed. That the complainants had no intimation that Brown was about to come, at that or any other time, for the purpose aforesaid, and had supposed, for reasons above stated, that he had relinquished any intention of seeking a compliance with said agreement, more particularly as the complainants, on that day, for the first, discovered the additional fact that there was another mortgage

---

Washer v. Brown.

---

on the premises for \$200, of which the defendant had not informed the complainants. That the complainants again declined to accept a deed for a part of the premises, and, as a reason therefor, repeated to Brown the charge that he had deceived them as aforesaid, and that Brown admitted the truth of the charge, but replied that the well and the shed belonged to the Paterson Turnpike Company, and that the complainants might obtain the right to use the same, and that he would give a warrantee deed for the residue of the premises. That the complainants declined to receive such deed. That on that occasion the complainants, or one of them, told Brown they had sent him a letter informing him of their intention, so that it might not occasion any damage to him, and that Brown admitted he had received the letter, and said it was no damage to him. That the complainants then told Brown that he had informed them there was but one mortgage on the premises, and that they had learned there was one or two others. That Brown replied that was no concern of the complainants, as he was willing to give a warrantee deed. That the complainants, or one of them, then suggested that it would be better to cancel the articles, and that Brown said that the damage to either party had been little or nothing, and that he was willing to do so, but he declined to do it at that time, on the ground that he had left his article at home, but proposed to meet the complainants, on the Friday or Saturday following, at the house of Peter C. Brown, and cancel the articles. That on that day the defendant refused to cancel the articles, saying that he had changed his mind. That the strip of land on which the well and shed are, is owned by William N. Colfax, and is now held by Peter Quackenbush, under a lease from said Colfax. That the deed from Harriet Merselis to Brown, referred to in the said articles, does not include the said strip of land, and that Brown, therefore, had no title thereto by the said deed. That when the said articles of agreement were executed, there was, besides the mortgage of \$1000 therein mentioned, another mortgage on the premises, given by Brown and his wife to Peter Quackenbush, for \$200, dated May 1st, 1841, and that the same is still unsatisfied. That the complainants have been informed and believe, and charge the truth to be, that since the execution of



---

Washer v. Brown.

---

the said articles of agreement, the said \$1000 mortgage has been foreclosed, and the equity of redemption in said premises sold, and Brown dispossessed. That Brown is not of sufficient responsibility to answer in damages for a breach of warranty; and that he has removed from Passaic, and now resides in Essex county. That Brown has commenced an action for covenant broken, in the Supreme Court, against the complainants, and filed his declaration therein for an alleged breach of the said agreement. The bill states that the complainants are informed and believe, and therefore charge, that no part of the principal or interest secured by either of the two mortgages has been paid, and that the principal and interest due thereon when the said agreement was executed, exceeded the sum which, by the said agreement, the complainants were to pay Brown for the premises.

The bill prays that Brown may be decreed to deliver up the said articles of agreement to be canceled, and to refund to the complainants the money paid by them on the said agreement; and that he may be enjoined from further prosecuting his said action at law.

An injunction was granted, according to the prayer of the bill in that respect.

The defendant put in his answer on the 27th May, 1845. The answer denies that he represented, in any way, to the complainants, that he was the owner of the strip on which the well and shed are, but says that he told the complainants, when they were looking at the property, that the said strip did not belong to him. He says further, that before the agreement was reduced to writing, he informed the complainants that there were two mortgages on the premises, one for \$1000, which he thought could remain if the interest was paid, and one for \$200, which it was agreed between him and the complainants should be paid off at the time of the delivery of the deed. He denies that he concealed, in any way, the existence of the mortgage, but says it was agreed between him and the complainants, that when the deed was delivered, the parties should go together to the holder of the mortgage and pay it off from the amount of the first payment to be made by the complainants to the defendant, and that the said mortgage should

---

Washer v. Brown.

---

be canceled. That after the agreement was made, the defendant proposed Judge Young as a competent person to draw the articles; that the complainants and defendant went together to his house, and the agreement was stated to him in the presence of all the parties, and he was requested to reduce it to writing, and that in order to give him a full description of the property, the deed to the defendant for the property intended to be sold was produced and read and examined, and the defendant thinks the complainants read the description therefrom; that the deed was open on the table before them all, while the agreement was drawn; that Young drew the agreement in the presence of the parties, and read it to them; that both the complainants looked at, and he thinks examined the said deed. That he did not, in any way, represent to the complainants that the said strip of land belonged to him, or that he had a right to sell it. He denies that the premises were useless for the purpose of keeping a tavern without the said strip, and were worth a third less than the amount agreed to be paid, but says they were worth the \$1400 for the purpose of a tavern. He admits that he received from the complainants a letter stating that they should not take the property, but says it was not mailed to him till the first of March, as appears by the post-mark. The answer gives a copy of the letter. It is dated February 22d, 1844. It informs the defendant that the complainants will not take the property; that they had purchased elsewhere; that the defendant's neighbors had told the complainants that he did not own where the well and shed were; and says that if he does not, he has no one to blame but himself; and that if it is not sold, he has nobody to blame but his own neighbors. The defendant admits he tendered the deed to the complainants, but says the tender was not made on the 7th of February, as stated in the bill, but about the middle of March; and says that when he tendered the deed, Washer, the father, said he had altered his mind and purchased elsewhere, as his son would rather live in Newton; and he denies that at that time or any other, he admitted that he had sold, or agreed to sell, the said strip, or represented that it was his, but says that at that time, and in the presence of said Ryerson, he denied having made any such representation to the complainants. He denies that the complain-

---

Washer v. Brown.

---

ants, or either of them, stated that they were ready to comply with the agreement if the deed corresponded with the description given to them; and denies that he had said that the refusal of the complainants to take the deed had been no damage to him; and denies that he had said it was no concern of the complainants, for that he gave a warrantee deed for the premises, when the complainants spoke of the second mortgage; and says that he stated, at that time, to the complainants, that he had told them of the second mortgage; and denies that he had deceived the complainants in any way, or made any false representation. He says no proposition or agreement was made to cancel the articles, but that it was agreed by the parties, in the presence of Ryerson, that they should meet at a future day, at the place mentioned in the bill, and leave the matters in difference between them to men. He says that on the day agreed upon, he went to the place agreed upon, for the purpose of meeting the complainants, and leaving the matters in difference between them to men, as agreed on, and not for the purpose of canceling the articles of agreement. That neither of the complainants came, but that a person representing himself to be a son of one of the complainants came, and said he came to settle the business. That the defendant asked him if he was ready to choose men, as they had agreed, and he said his father had told him not to do so. The defendant denies that, on that occasion, he said he had changed his purpose, and was not willing to carry into effect his agreement to cancel the articles, for that no such agreement was made. He admits that the said strip of land is owned by Colfax, and is held by Quackenbush under a lease. He admits that the property agreed to be sold by him has been sold under the \$1000 mortgage. He says he is of sufficient responsibility to answer any damages for breach of warranty, and that he believes himself to be worth \$1000 after his debts are paid. He says it is not true that the interest on the two mortgages was all unpaid, and that the amount due on them exceeded the amount to be paid by the complainants for the property, but says there was but about \$75, which would become due the next spring, over and above the amount of the principal. He says that it was agreed that the interest on the \$1000 mortgage should be paid from the



---

Washer v. Brown.

---

purchase money to the holder of the mortgage; and that he agreed to go with the complainants and see it done, and endeavor to get an extension of time to pay the principal; and that it was agreed that the parties should go together to the holder of the \$200 mortgage, and that that should be paid from the purchase money, and canceled. He says he resides in Essex county, where he is carrying on business, having made his arrangements to remove from Passaic county in consequence of the sale he supposed he had made to the complainants.

On this answer a motion was made to dissolve the injunction.

*L. C. Grover*, for the motion.

*D. Haines*, *contra*.

THE CHANCELLOR. The second mortgage imposed no serious difficulty on the complainants; in reference to that they were purchasers for full value, and would be entitled to have it removed by the application of a part of the purchase money for that purpose. But the answer states that this was in fact the agreement. As to the other part of the case, the allegations on which the equity of the bill rested are sufficiently denied by the answer. The injunction will be dissolved.

Order accordingly.

# CASES

ADJUDGED IN

## THE PREROGATIVE COURT

OF THE

STATE OF NEW JERSEY.

JUNE TERM, 1845.

---

OLIVER S. HALSTED, ORDINARY.

---

IN THE MATTER OF THE PROSECUTION OF THE BOND OF  
EDEN S. WEBSTER, ADMINISTRATOR, &c., OF JOHN S.  
WEBSTER, DECEASED.

1. Motion to vacate an order of the Ordinary, vacating an order to prosecute an administrator's bond, denied, the Supreme Court having acted on the vacating order, and dismissed the suit on the bond.

2. By whom application may be made to the Ordinary, for leave to prosecute an administrator's bond.

---

John S. Webster, late of the county of Essex, died intestate, in the year 1841. In September of that year, administration was granted to Eden S. Webster, who, with William Webster as his surety, gave bond to the Ordinary, in the penal sum of \$3500, with a condition in the form prescribed by the statute. The administrator shortly after filed an inventory of the goods and chattels of the intestate, amounting to \$1699.07½.

---

Administration bond of Eden S. Webster.

---

On the 16th of February, 1843, a copy of the said bond, certified by the surrogate of Essex to be a true copy, and a certificate of the said surrogate, that on the 27th of September, 1841, the said administrator filed in his office an inventory of the personal estate of the said deceased, and that, since that time, nothing appeared of record in reference to said estate, were produced before the Ordinary, by an attorney and counselor of the Supreme Court, and on his suggestion, no doubt, as to the person to be named as making the request, the Ordinary thereupon made the following order: "Upon the request of Felix Handequin, let the administration bond within named be prosecuted, and the moneys recovered applied in the manner directed by law."

In the term of February, 1843, of the Supreme Court, Handequin caused a suit to be commenced on the bond. Process was issued against the administrator and his surety, William Webster, and was returned served on William Webster, and "not found" as to the administrator. William filed a demurrer in the suit, which was overruled, and he was thereupon ruled to plead. He neglected to do so, and, after the time for pleading was out, he applied to the Ordinary, at the July Term, 1844, of the Prerogative Court, to set aside the order which had been granted for the prosecution of the bond. Notice of his application was given to the attorney of the plaintiff, in the Supreme Court, and the following grounds for the application were stated in the notice:

1. That no petition was filed.
2. That the application, if any, was not verified.
3. That there was no bond to indemnify the Ordinary against costs.
4. That it did not appear that the application was made at the instance of any party grieved.
5. That the application was not, in truth, made at the instance of any creditor of the intestate, or of any party grieved.

The matter was argued before the Ordinary, and an order was made vacating the order to prosecute the bond.

In consequence of this order, the Supreme Court, in September, 1844, on motion in behalf of the defendants in the suit on the administration bond, dismissed that suit.



---

Administration Bond of Eden S. Webster.

---

In the term of April, 1845, of the Prerogative Court, application was made to the ordinary to vacate the said vacating order, to the end that the Supreme Court might be moved to restore the suit on the bond. The argument on this application was heard on the 10th of May, 1845.

*Mr. R. Van Arsdale*, for the motion, contended that the order of February 16th, 1843, giving leave to prosecute the bond, was regular, and properly made. The application for the bond is an *ex parte* proceeding. *Elm. Dig.* 167, § 15. The act of prosecuting is the act of the Ordinary. The bond is sued for the general benefit of creditors and next of kin. That the order of August, 1844, vacating the order for prosecution, was irregular; and should be set aside. This last order was made on application by and in behalf of the obligors in the bond, or one of them. The obligors in the bond are no parties to the proceeding before the Ordinary, to obtain the bond for prosecution. No person can take advantage of error except a party to the record. Again, the order of August, 1844, was irregular as to time; it was too late to apply for such an order. The suit on the bond was commenced in February, 1843, in the Supreme Court, and it was not until July, 1844, that an application was made to the Ordinary to vacate the order for the prosecution. He cited 4 *Paige* 289, 439; 3 *Ib.* 574; 3 *Hill's Rep.* 393; 10 *Wend.* 561.

He said that no petition was necessary on the application to the Ordinary for leave to prosecute the bond. *Cowper* 140. The words of our statute are, "At the request of any party aggrieved by such forfeiture." That no verification is necessary of the facts on which the application to the Ordinary for leave to prosecute the bond is made, and that no proof of debt is necessary. That any person may apply for leave to prosecute, if he can show that some person has been aggrieved—it is not necessary that the applicant be aggrieved. The actual proof of individual debt is not important; there must be somebody aggrieved.

When the Ordinary orders the bond to be prosecuted, it is that the whole estate may be settled. 5 *Halst.* 67. It is not the creditor's proceeding, but the Ordinary's.

*Mr. A. Whitehead, contra.* This is an application, not for an original order to prosecute, but to vacate an order setting aside an order to prosecute. The propriety of the original order is one question ; the propriety of restoring that order by vacating the order setting it aside, is another question.

The facts shown on the application for the original order were insufficient, if verified. The application for leave to prosecute the bond on the ground of his being a creditor, should first establish his claim by obtaining a judgment. The cases in 5 *Halst.* 65, and 1 *Ib.* 195, show that, on the prosecution of an administration bond, there can be no inquiry as to the individual debt of the person at whose instance the bond is prosecuted. Suppose it to be the only claim, and the administrator desires that the question whether the person making it is a creditor, be first settled, will his refusal to pay it without a suit be a breach of the administration bond ?

He contended that the original order for leave to prosecute was improvidently and illegally made. "Request," in the statute, means request in writing. There should have been a petition.

Again, the facts on which the application is made, should be verified. There should be a *prima facie* case made, by petition and affidavit. Is the Ordinary to take it for granted that the party applying for leave to prosecute is a party aggrieved ? Should it not be stated in writing, and on oath, how he is grieved ? The argument on the other side would make the practice of the court very uncertain.

Again, the action was commenced in the Supreme Court in February, 1843. There was no order at that time for the prosecution of the bond, because no such order was then on file. It was not filed until July, 1844. The case in 1 *Green* 3, does not decide the question.

Again, the applicant for leave to prosecute was not required to give bond for indemnity against costs. The bond, I take it, is required for the indemnity of the defendants in the suit, and not for the indemnity of the Ordinary. The Ordinary could not be obliged to pay costs. There could be no judgment against the Ordinary for costs. No statute gives costs against him. And if judgment could be given against him for costs, how

could the costs be made? Has he any property as Ordinary? It could only be by some proceeding by petition to the government of the state.

It has been the practice uniformly to require bond, and the party defendant relies for costs solely on this bond given to the Ordinary. They would have it on the other side, that the Ordinary may be asked in the street, and by a citizen of another state, for leave to prosecute an administration bond, and that too on a mere allegation that the estate was indebted to him.

The question now before the Ordinary is to be determined on the same grounds which were presented to the Ordinary on the application for the first order. The question now is, was the first order improvidently granted? And in addition to the objections already urged against the propriety of that order, Mr. W. asked if there was any evidence of a forfeiture.

Was the order vacating the order for prosecution, illegally made? It is objected that too much time had elapsed before the application for the vacating order was made. That was a question for the ordinary. Suppose there had been laches, this is not a technical matter. The correctness of the order to prosecute is the groundwork of the whole proceeding; nor are our objections to the order to prosecute technical. The substantial fact that the party applying for it was aggrieved, should have been made out, and a bond should have been given. And if it be discovered by the defendant, at any time during the progress of the suit, that the bond has not been given, he should be allowed to apply to the Ordinary to stay the suit. If any error has been committed in ordering a prosecution, the party against whom the mistake is made, should be allowed to show that mistake to the Ordinary.

As to the cases cited by Mr. V. A., not one of them is a case where the application was to the court that made the order. The question here is, whether the proceedings of the Ordinary have been regular. If this court discovers it has made, *ex parte*, an imprudent order, it will correct the error. *Ex parte* orders are frequently made without strict examination. As to the case cited from Cowper, it does not appear by the case how the authority to prosecute the bond was applied for or given. We do



---

Administration bond of Eden S. Webster.

---

not know the statutory provisions in England for procuring the bond, or that they have any such provision. Here the judicial action of the Ordinary is required on the case made before him. Our act says, "in case any such bond shall become forfeited." Is not the Ordinary to consider the point of forfeiture at all?

Again. I cannot admit the proposition contended for on the other side, that if there be a forfeiture, any person may be permitted to prosecute who chooses to apply to the Ordinary for liberty to do so. It must be a party aggrieved. Another thing is to be observed. The written application now made is not verified. There is nothing appearing even now, but the mere allegation of the petition, signed by a proctor, to show that the person who obtained the order to prosecute is a creditor. He submitted that the vacating order should stand. We are before the same court that made both these orders, and the present application must be considered in the same way in which it would be considered if we were before the same individual.

*Mr. W. Pennington*, in reply. On the 16th of February, 1843, the Ordinary directed the prosecution of this administration bond. On the 29th of August, 1844, the Ordinary vacated the order for prosecution. We are now in the same court, on an application to vacate the last order and allow the first to stand. Two questions are presented:

1. Was the first order legal?
2. Be the first order legal or not, was the last order legal?

If the last order was not legal, it will be vacated, and the first be let to stand.

*First.* The order of February, 1843, is legal. The Ordinary may make the order. It is not the Prerogative Court; if it was, it would be necessary to be made in term; but it is the Ordinary, and it may be done in vacation. As to the legality of the first order, what was the case presented? I think there was more there than counsel allow. There was, first, a copy of the bond; second, a copy of the oath of the administrator; and, third, a certificate of the surrogate, that since the filing of the inventory, nothing appeared of record in his office, in reference to the estate. Administration was granted in September, 1841.

---

Administration bond of Eden S. Webster.

---

A condition of the bond is, that the administrator shall make an account of his administration within twelve months from the date of the bond. The only account he could make was to be made before this surrogate. I maintain that the Ordinary had the legal evidence of the forfeiture of the bond.

But it seems to be supposed that the Ordinary must also be satisfied of the debt. This I deny. The Ordinary may make the order for prosecution, on the request of a party alleging himself to be a creditor; this is sufficient. No oath of the debt is necessary, nor required in practice. Whether he is a creditor or not is the very thing for the common law court to settle.

*Mr. Whitehead* here said that is the very thing that cannot be settled in the law court, in a suit on this bond.

*Mr. P.* said it certainly could not be supposed that the Ordinary is to adjudge the indebtedness. No notice of an application for the bond, for prosecution, is given by any practice, or pretended to be necessary. The act says, "in case any such bond shall become forfeited, it shall be lawful for the Ordinary to cause the same to be prosecuted, at the request of any party grieved by such forfeiture." Is it not enough to shut the mouth of the administrator, that the bond is forfeited? If it is not forfeited, he can defend himself at law. The moneys recovered are to be applied towards making good the damage sustained by the not performing the condition of the bond, in such manner as the Ordinary, as judge of the Prerogative Court, shall, by his sentence or decree direct.

The power to put the bond in suit is entrusted entirely to the Ordinary, otherwise notice to the administrator would be required. The least that should be required before such an order should be vacated, would be proof that the applicant for the order had no claim.

It is objected to the first order, that no security for costs was required. My proposition is that this is not required by law, or by any rule of the Ordinary, or the Prerogative Court. Now, can an order be set aside for irregularity in this respect, when no bond or security for costs is required by law? If the late Ordinary, when moved to vacate the first order, had required a bond, it would have been right. If the Ordinary here now should require a bond, we are ready to give it. It is a matter

---

Administration bond of Eden S. Webster.

---

of discretion with the Ordinary, whether he will require a bond or not. I differ also as to the character of the bond, if given. The form of the bond is for the indemnity of the Ordinary against his liability for costs.

Again, it is said that the application should be verified. This is not required; not a case is to be found on file in which it was done. The statute forbids the idea of verification; it is to be on request. The Ordinary has power now to make any additional order. Security is sometimes required, and sometimes not. The bond is to protect the Ordinary.

The next proposition is equally clear. Whether the first order was right or wrong, the order vacating it was wrong. I maintain that there was no person before the Ordinary who had a right to make the application to vacate the first order.

**THE ORDINARY.** The complaint against the order for prosecuting the bond is that it was made without petition; without any verification of the facts on which it was applied for; without bond to indemnify the Ordinary against costs; and without its being made to appear that the application for the order was made at the instance of any party aggrieved; and under this last head of complaint it was further complained, in argument, that no forfeiture of the bond was made to appear to the Ordinary. The order was so made, but it was made to appear to the Ordinary, on the application to him for the order, that the administrator had failed to comply with that part of the condition of the bond which required him to make, or cause to be made, a just and true account of his administration within twelve calendar months from the date of the bond. This was, no doubt, the ground on which the Ordinary made the order.

On the application of a proper person, an order for the prosecution of an administration bond may be made on this ground; though the Ordinary might not feel constrained in all cases to make it on this ground alone. Few estates are or can be settled within the year; and though the administrator might, and ought to state an account within the year, as far as he has gone, (see 1 *Salk.* 316,) yet the omission to do this is not so serious a dereliction of duty as should constrain the Ordinary, in



all cases, to order a prosecution of the bond for that cause alone. In applications founded on that ground alone, the Ordinary exercises his discretion. Great vexation and expense might be produced to little purpose, by a prosecution for that cause alone. In this case, the Ordinary, in the exercise of his discretion, made the order on the ground above stated.

No complaint could be made against the order to prosecute, on the ground that no forfeiture was made to appear. The want of a petition and verification of facts, and of a bond to indemnify him against costs, are not grounds on which the obligors in the bond can come before the Ordinary and ask him to vacate his order to prosecute. These were matters for the consideration of the Ordinary, on the application for the order to prosecute. It has not been the practice, as far as I can learn, to verify the petition by affidavit.

I am not apprised of the grounds on which the order to prosecute was vacated. The want of a bond of indemnity may have had its influence; but I am not prepared to say it should have been vacated on that ground.

The inquiry in the mind of the Ordinary who vacated the order to prosecute, was, no doubt, whether the application for that order was made by a proper person. There is nothing connected with the order to prosecute, to show on whose application it was made, except the words used in the order itself: "Upon the request of Felix Handequin, let the administration bond," &c.; and nothing appears on the papers exhibited to the Ordinary on that application, to show who Felix Handequin was.

The application must be made by some person aggrieved. The language of the statute is, that the Ordinary may cause the bond to be prosecuted "at the request of any party aggrieved." Was it shown to the Ordinary, on the application for the order to prosecute, that Handequin was a party grieved?

A judgment creditor is a party grieved by the failure of the administrator to comply with the conditions of his bond. 13 *Johns. Rep.* 437. Is one having only a demand *in pais*, to be considered a party grieved? If the non-payment of a demand *in pais* is no breach of the bond, is the Ordinary, without notice to the administrator, (no notice is ever given,) and without knowing or inquiring whether the demand is disputed or not,

---

Administration bond of Eden S. Webster.

---

to consider the party applying for the bond a party aggrieved, merely because he presents a claim against the estate? To one who is a creditor, or, in the language of Ld. Mansfield in the case in Cowper, to one who has a right, it is *ex debito* to grant the liberty of suing the bond; to one who has no right, it is *ex debito* to refuse it.

Now, whether one is a creditor or not, has a right or not, may be the very question which the administrator insists shall be tried and decided by the judgment of the proper tribunal. The fact of there being a forfeiture of the bond for failure of making an inventory or account, does not decide that the party applying for leave to prosecute the bond is a party aggrieved. By the language of the act, there must be a forfeiture, and a party aggrieved.

Without being able to say what has been the practice in this respect, if there has been any uniform practice, I think that, as a general rule, the Ordinary should not order the prosecution of the bond, except at the instance of a judgment creditor; but I am unwilling to say that this rule should be uniformly adhered to. Much will rest, in these applications, in the discretion of the Ordinary. Cases may be supposed in which, from the nature of the breach, as great lapse of time without inventory or without accounting, or palpable conversion of the estate by the administrator to his own private use, leaving numerous debts unpaid, the Ordinary would act on the petition of a person claiming to be a creditor, without judgment, on being satisfied of the facts in such way as he might require.

I have said more than was necessary for the decision of the question now before me. The question is, whether the Ordinary will now vacate the order of July, 1844, which vacated the original order for prosecution.

The ground on which I felt and expressed an unwillingness to do so, when the matter was first moved, in the absence of the opposing counsel, was shortly this: The Ordinary first grants the order to prosecute; suit is instituted in the Supreme Court, and progressed in for a year, more or less. The Ordinary then, on application, vacates the order for prosecution; thus, in effect, asking the Supreme Court to dismiss the suit before them. That court, on the production before them of the vacating order, dis-

---

Batton et al. v. Allen et al.

---

miss the suit. This was done in September Term, 1844. The Ordinary is now asked to vacate the vacating order, and let the original order for prosecution stand, to the end that the Supreme Court may be then asked to restore the suit and permit it to proceed. If the same individual, as Ordinary, had made both orders, could he, with any propriety, make the one now asked? I think not, and counsel on both sides have agreed that the matter is to be settled on that principle.

It struck me, when the matter was first moved, as being decidedly better that a new application for leave to prosecute should be made, and I am still of that opinion.

Motion denied.

CITED in *Green, Matter of*, 4 Hal. Ch. 554; *Matter of Honnass*, 1 McCart. 495.

---

#### GEORGE BATTON ET AL. v. JAMES L. ALLEN ET AL.

1. A father had recovered a judgment against one of his sons, and caused an execution to be issued thereon and put into the hands of the sheriff. After the son's death, the father signed a writing at the foot of the execution, in these words: "I hereby discharge J. W. Caldwell, sheriff, &c., from all liability whatever of the above-stated execution, the defendant being dead, and no further proceeding required on the same." The father afterwards died intestate, and there was a balance of his personal estate, for distribution, of about \$14,000, exclusive of the amount of the said judgment. The deceased son left three children, and six children of the intestate father survived him. *Held*, that the said writing given to the sheriff did not discharge the debt, so as to entitle the children of the deceased son to an equal seventh of the said balance, but that the amount of the debt should have been added to the said balance, and one-seventh of the whole sum decreed to each of the six surviving children; and that the amount of the debt should constitute so much of the seventh to be distributed to and among the children of the deceased son.

2. A note given by a son to a father, is not, of itself, evidence of an advancement by the father.

3. Proof of mere parol declarations of a father, that he had fully advanced a child, is not sufficient to establish an advancement.

---

Michael Allen, late of the county of Gloucester, died intestate, in May, 1840, leaving six children living, and three grandchildren, the children of his son James, who died before him.



---

Batton et al. v. Allen et al.

---

Henry Allen, his eldest son, administered; and at the October Term, 1842, of the Orphans' Court of Gloucester, made a final settlement, by which a surplus of \$14,870.73 was found in his hands for distribution. At the December Term, 1842, application was made to that court to decree and settle the distribution of the surplus. The three grandchildren claimed a full seventh, in right of their deceased father. This was resisted by the surviving children, on the ground that James, the deceased son, had, as they claimed, been advanced by the intestate in his lifetime. A judgment in favor of Michael Allen, against his son James, for \$700 debt and \$5 costs, was entered in the Common Pleas of Gloucester, on a bond and warrant of attorney, on the 15th of June, 1835. Execution was issued on this judgment, and put into the hands of the sheriff of Gloucester, in the lifetime of James. After the death of James, Michael Allen signed a writing at the foot of the execution, in these words: "I hereby discharge J. W. Caldwell, sheriff, &c., from all liability whatever of the above-stated execution, the defendant being dead, and no further proceeding required on the same."

Certain notes given by James to his father, of dates prior to the bond and warrant, and against which the statute of limitation had run, were exhibited.

The Orphans' Court, after hearing testimony, decreed that distribution of the said surplus be made in equal seventh parts; one-seventh to each of the six surviving children, and the remaining seventh to be divided equally among the children of the deceased son James. Neither the amount of the said judgment, nor of the said notes, was included in the said surplus.

From this decree an appeal was taken by the surviving children to this court.

The respondents, in their answer to the petition of appeal, say, first, that no appeal lies from the said decree to this court; second, that the decree is right, and ought to be affirmed.

The testimony on the part of the surviving children is as follows: .

Abigail Stout.—She heard the intestate say he had advanced money for his son James; she does not know that she ever heard him say how much; heard him say he did not desire to

make a will; she kept house for him better than nine years; she heard him say he had let James have money before she came to live with him; she knew James to get of his father, after she went to live with him, one hundred and ten dollars in pork and forty dollars in cash; she recollects intestate's telling her he had advanced to James as much as he thought proper at that time; he told her, one day, that the law made a will good enough for him.

Being cross-examined, she said James died about six years before the time of her examination as a witness; Michael Allen died in 1840; James was not present at any of the conversations she had with Michael; Michael charged the one hundred and ten dollars for the pork, to James, in a book or note—she thinks a note; she is pretty certain he took a note; all she knows about James' getting the pork, is what Michael told her; she never saw the note or book account; she heard Michael say James got the forty dollars; she did not see it counted, but she was in the house.

Mary Moore testified that she heard Michael say he had given James all he expected to give him; that he had set him up twice; that he had not done as well as he could wish. On cross-examination, she said this conversation took place about eleven years before.

Jesse C. Chew.—Michael Allen has said to me that he had advanced liberally to James. Being cross-examined, he says he thinks Michael told him he set out Henry Allen, another son, with some money and a horse, when he left his house; Enoch Allen, another son, was about thirty years old when he died; he had been away from his father's several years before he died; his mind was impaired, and his father boarded him out; witness understood the old gentleman that he paid for the board of Enoch; witness knew three of the daughters; they lived with their father several years after they were grown; witness understood they received an outfit when they left their father's house, but does not know what it was.

Louisa Batton.—She lived in the house of Michael Allen about two years before he died; she heard Michael say he had let James have a good deal of money, and as much as he intended to let him have, till he saw whether there was any more

---

Batton et al. v. Allen et al.

---

coming to him or not; he said he thought he had let him have as much as he would be able to let the other children have—as much as would be coming to the other children.

Being cross-examined, she says she is seventeen years of age; she is hired at Mr. Sherwin's, who married one of the daughters of Michael Allen; the conversation took place at Michael Allen's, about three years ago last summer; there was no person present; she was in the kitchen at the time; he has told me that several times; she understood he was eighty or eighty-one years old when he died; he spoke to her frequently about his other business; she was hired at Michael Allen's.

Bowman Sailer.—Michael Allen stated to witness that his property at Barnesborough stood him in about five thousand dollars; that he had advanced money to James, and had got no rent for the time James lived there; Henry wished his father, Michael, to take the note which he, Henry, held against James, and keep it out of the share of his estate that would be coming to James after Michael's decease; Michael held some writings against Henry, for about the same amount that Henry held against James; and Michael said he went down to Salem and signed Henry's writings away, and made him very angry, and that he got a sharp letter from Henry about it.

The testimony on the part of the grandchildren is as follows:

Abigail Stout, the first witness called for the surviving children, being called on the part of the grandchildren, testified as follows: She remembers when James went to Natchez; when he left Barnesborough, she heard Michael say James had assigned him notes, but she cannot tell the amount; Michael appeared to be satisfied while James lived at Barnesborough; Michael said these notes were assigned to him by James to collect, and pay him as far as they would go; he did not say all; he did not say they would pay all; he did not say whether he was satisfied or not; he did not express any dissatisfaction; this was, perhaps, three weeks before James left for Natchez; Michael and James were together several times, shortly before James went to Natchez, about their business; Michael showed her some notes; he did not show her all; Michael told her James had assigned him notes that would satisfy him for what



---

Batton et al. v. Allen et al.

---

he had let James have, in part; he did not say all. Cross-examined, she says she never heard Michael say he had given James all he expected he would get; or that James would get no more, unless the other heirs agreed to give him more; she has heard him say he did not wish to give James any more till he knew what was coming to him of his share of his estate.

Lydia Allen, sworn on the part of the grand-children, says— She is the widow of James; Michael and James were frequently together before James went South, talking about their business; she heard Michael say that James owed him money, and he wished him to pay it; she knows James assigned him notes at different times; these notes were assigned shortly before James went South; she saw Michael sign a paper at Swedesborough.

*Jeffers* and *G. D. Wall*, for the appellants.

*Browning* and *H. W. Green*, for the appellees.

Cases cited on the part of the appellants: 1 *Ves.* 17; 1 *Mad. Ch.* 506; 2 *P. W.* 560.

THE CHANCELLOR. No money or other property was advanced by the father to James, as an advancement, in form. Whatever he let James have, he took his note or obligation for; he put it in the shape of a debt from James to him. The testimony on the part of the surviving children, even if all admissible, is of entirely too indefinite a character to establish an advancement. It was not claimed, I think, at the bar, that proof of mere parol declarations of a father, that he had fully advanced a child, would be sufficient. See *Toller* 397; 1 *Atk.* 407.

The counsel for the appellants rely, first, on the notes given by James to his father. A note given by a son to the father is not, of itself, evidence of an advancement by the father. It is evidence of indebtedness by the son. The amount of the note may be recovered back from the son, either by the father, in his lifetime, or by his personal representatives, after his decease;

---

Batton et al. v. Allen et al.

---

but no part of an advancement can be recovered back. The very object of the father in taking the note should be presumed to be, to avoid the inequality which would result, if his personal estate at his death should be insufficient to give to each of his other children an equal sum. It is not a gift; the father does not divest himself of the property. This is not opposed to the case of *Wanmaker v. Van Buskirk*, in *Saxton* 688. The opinion of the Chancellor in that case, that the amount of the bond was an advancement, was founded on the peculiar circumstances of the case.

It was contended that the notes exhibited in this case should be considered as advancements, because they are outlawed. If nothing appeared but the fact that these notes were found among the papers of the intestate after his death, and that they were all outlawed, and could not therefore be made available as debts, it might be a serious inquiry what would be the proper presumption; whether the presumption of payment, arising from lapse of time, or the presumption that the father omitted to collect them, or have them renewed, on the ground that he was willing the son should retain the amount as an advancement. But, in my view, it is not necessary to discuss that question in this case. Under the admissions and acts of the intestate, it would certainly be unsafe to declare that the whole amount of these notes should be considered either advancement or debt. It appears that, shortly before James went to the South, he assigned notes to his father, in part payment of what he owed him. He also gave a bond to his father for \$700, and a warrant of attorney for the confession of a judgment thereon; and judgment was entered thereon accordingly. There is no evidence that the bond was given on a new or separate advance of money. The transaction has the appearance of a settlement between them of the amount due from James, and the confession of a judgment for the amount. I am unwilling to consider the notes as evidence, either of advancement to James, or of debt due from him to the estate.

There can be no doubt that James, in his lifetime, and his estate, after his death, was indebted to his father, the intestate, in the amount of the judgment. If this debt had been released by the father to James, in his lifetime, it might, perhaps, be

---

Batton et al. v. Allen et al.

---

considered an advancement. *Gilbert v. Wetherell*, 2 *Sim. and Stu.* 254. But it remained a debt from the estate of James to his father, at the father's death. The endorsement made by Michael Allen on the execution, discharging the sheriff "from all liability whatever of the execution, the defendant being dead and no further proceedings required on the same," did not discharge the debt, so as to entitle James' children to an equal seventh of the surplus, exclusive of the amount of this judgment debt. And this discharge of the sheriff was not an advancement to James, for James was then dead.

For the purpose of settling the distribution, the amount of this judgment debt should have been added to the said surplus; and should form a part of the distributive share of the three grandchildren, who represent their deceased father, James. The decree of distribution made by the Orphans' Court, was made without respect to this judgment debt; and the children of James were decreed to be entitled to an equal seventh of the surplus, though that surplus did not include the judgment debt.

I think the decree is erroneous. The Orphans' Court should have added the amount of the judgment, with interest thereon to the death of Michael Allen, to the surplus found by the account of the administrator as stated; and have decreed that one-seventh of the whole sum be paid to each of the surviving children; and that the judgment against James be satisfied, and the residue of the money in the administrator's hand be paid to the children of James, equally among them. A decree to this effect will be made by this court.



---

Anderson et al. v. Hendrickson.

---

## JOSEPH B. ANDERSON ET AL. v. MARY HENDRICKSON, SURVIVING EXECUTOR OF THE WILL OF BENJAMIN HENDRICKSON, DECEASED.

'The testator gave to his wife the use and interest of all his personal estate during her widowhood, and also the use and possession of all his real estate during her widowhood, *and as is in his will after directed and limited*, in lieu of dower; and directed that, on the death or marriage of his widow, before his youngest daughter attained the age of eighteen years, the surviving executor should sell the personal property bequeathed to the widow, and place the proceeds at interest; and directed his Read farm to be sold when his youngest daughter attained the age of eighteen, or sooner, if his executors, or the survivor of them, should think it most for the benefit of the estate; and that whenever the sale of the real and personal estate thus directed to be sold should be made, the same should be placed at interest and be equally divided among his seven daughters, share and share alike, and paid to them when they should respectively attain the age of eighteen years; and devised his homestead farm to his son when he should attain the age of twenty-one years; and directed that in case his son should die without issue before he attained the age of twenty-one, the said homestead should be sold, at the discretion of his executors, or the survivor of them, and the proceeds thereof be placed at interest and divided among his surviving children, share and share alike, and paid in the manner before directed; and appointed the widow and another executors. *Held*, that on a sale of the Read farm by the widow, as surviving executor, before the youngest daughter attained the age of eighteen, each daughter then under eighteen was entitled, on attaining that age, to her share of the proceeds of the sale, without interest; and that the daughters who had then attained eighteen were entitled to their respective shares of the proceeds immediately.

Benjamin Hendrickson, by his will, dated May 25th, 1828, and proved in February, 1829, gave and bequeathed to his wife, Mary, the use of such of his movable estate as she might select, and also the interest of all his other personal estate, during her widowhood; and also the use and possession of all the real estate whereof he might die seized, to have and to hold during her widowhood, *and as is thereafter directed and limited*; declaring the bequests aforesaid to be made in lieu of dower, and in the full trust and confidence that she would bring up, support, maintain and educate in a proper manner, his children, (naming them,) and provide for them in the best manner, and

---

Anderson et al. v. Hendrickson.

---

watch over them with maternal tenderness and affection ; and appointed her their guardian. The second item in the will directs that whatever movable estate his wife might not choose to keep, should be sold, and the proceeds thereof applied, in the first place, to the payment of debts and expenses, and the residue thereof be placed at interest, and the interest be paid annually to his said wife during her widowhood. The fourth item directs that in case his wife should die or marry before his youngest child attains the age of eighteen, the executors named in the will should sell all the personal estate bequeathed to his wife as aforesaid, and place the proceeds at interest. The fifth item directs his executors, or the survivor of them, whenever his youngest daughter attains the age of eighteen, to sell the Read farm (a part of his real estate) in such manner as they, or the survivor of them, should deem most for the benefit of his estate ; and in case they, or the survivor of them, should consider it most for the benefit of his estate to sell the same sooner, they, or the survivor of them, might sell the same at any other time. The sixth item is as follows : " Whenever the sale of the real and personal estate thus directed to be sold, shall be made, then I order and direct that the same shall be placed at interest, on good landed security, and be equally divided among my before-mentioned daughters, share and share alike, and paid to them when they respectively attain the age of eighteen years." He then devises his homestead farm to his son Benjamin, when he shall attain the age of twenty-one years ; to hold to him, his heirs and assigns forever, subject to certain privileges of his wife, if she should be then living his widow, to wit, the choice of two rooms, and her comfortable support by the said Benjamin during her widowhood ; and in case Benjamin should die without issue before he attained the age of twenty-one years, then the said farm to be sold, at the discretion of his executors, or the survivor of them, and the proceeds thereof be placed at interest, and divided among his surviving children, share and share alike, and paid in the manner before directed ; and Edward S. McIlvaine and his said wife were appointed executor and executrix of the will.

The testator left seven daughters and a son. In April, 1837, before which time five of the daughters had attained eighteen

---

Anderson et al. v. Hendrickson.

---

years, the widow, as surviving executor, sold the Read farm. Julia, the youngest daughter, attained the age of eighteen in December, 1842. The farm was sold for \$3000. The account of the executrix, after being audited and stated by the surrogate of Mercer, was reported by him to the Orphans' Court of that county, at the term of September, 1844, of that court.

In that account, the executrix is charged with the proceeds of the sale of the Read farm, sold April 11th, 1837, \$3000; and interest on the same from December 27th, 1842, the day on which the youngest daughter came of age, \$270.

This account was excepted to before the Orphans' Court, by the persons who are now the appellants in this court; and the exceptions were overruled, and the account was allowed by the decree of the Orphans' Court, as stated by the surrogate.

The exceptions to the account are—

1st. That the accountant hath only charged herself with interest on said \$3000 from December 27th, 1842, whereas she should have charged herself with interest on the same from April 11th, 1837, the day of the sale of the said farm.

2d. That said account, both in the charge and discharge thereof, is in divers particulars erroneous, and ought to be re-stated.

The case is here on appeal from the decree of the Orphans' Court.

*S. G. Potts*, for the appellants, cited 2 *Pow. Dev.* 4, 5.

*H. W. Green*, for the respondent, cited 6 *Cruise's Dig.* 292; 2 *Roper on Leg.* 329; 2 *Bl. Rep.* 738; 2 *Taunt.* 113.

**THE CHANCELLOR.** The question is when and how the distribution of the proceeds of the sale of the Read farm, sold by the widow as surviving executor, before the youngest daughter had attained eighteen years, and after some of the daughters had attained that age, is required, by this will, to be made.

The particular clause in the will providing for the distribution, is in the sixth item, and is as follows: "Whenever the sale of the real and personal estate thus directed to be sold shall be made, then I order and direct that the same shall be placed



---

Anderson et al. v. Hendrickson.

---

at interest, on good landed security, and be equally divided among my before-mentioned daughters, share and share alike, and paid to them when they, respectively, attain the age of eighteen years.

It is contended on the part of the appellants, that the proceeds of the sale, with the interest thereon from the time of the sale, are to be divided, &c., and paid to them when they, respectively, attain eighteen years.

It is contended on the part of the respondent, that the widow is entitled to have the whole proceeds kept at interest, and to receive the interest thereon till the youngest daughter attains eighteen years.

What is the meaning of the particular clause? What does it require to be divided, &c. and paid to the daughters when they respectively attain eighteen years? Is it the proceeds of the sale *and* the interest thereon? If this is the provision, (it is so contended for the appellants,) it would not matter to the widow and executrix when the principal and interest were to be divided and paid; whether to each daughter as she attained eighteen years, or to and among all when the youngest attained eighteen years.

The *words* of the clause do not require this reading of it; and certainly the intention, as derivable from the whole will, is opposed to this reading of the particular clause. The first part of the will gives the widow the use of all the estate, real and personal, during widowhood, *and as thereafter directed and limited*. This is sufficient to give her the use of the Read farm, and the interest of the proceeds of the sale of it, until she is restrained from or limited in the use or reception of the interest, by some positive subsequent provision. But there is no provision that the interest accumulate, or that the interest, as well as the principal, shall be divided among the girls when they respectively attain eighteen years. The construction, then, of the particular clause, as it seems to me, is, that it requires the widow to pay to each daughter her share of the principal money arising from the sale of the Read farm, when she attains eighteen years; the widow to receive, in the meantime, the interest on the whole, or such part of the proceeds of the sale, as shall from time to time remain at interest.

---

Anderson et al. v. Hendrickson.

---

Taking this to be the true construction of the particular clause, the next inquiry is, is there any reason, derivable from other parts of the will, or from the will as a whole, sufficiently imperative to constrain the court to depart from the language and import of the particular clause, and to adjudge that the intention of the testator was, that the widow should have the interest on the whole amount of the proceeds of the sale till the youngest daughter should attain eighteen years, (as is contended by the counsel for the respondent,) notwithstanding the express direction of the particular clause, that the same shall be divided among the daughters, share and share alike, and paid to them when they respectively attain eighteen years?

The fourth item of the will directs that if the widow die or marry before Julia (the youngest daughter) attains eighteen years, the surviving executor shall sell all the personal estate, and put the proceeds at interest; and here the clause stops. The latter part of the fifth item provides, that a sale of the Read farm may be made before Julia attains eighteen. We have thus both real and personal property that may be sold before Julia attains eighteen, the proceeds of both of which are subject to the provisions of the sixth item, which directs that whenever the sale of the real and personal estate thus directed to be sold, shall be made, the same shall be placed at interest. Thus far, the proceeds of both real and personal property are directed to be placed at interest. The time and manner of distributing both these proceeds is then provided for, in one and the same manner, in one and the same sentence. They are to be equally divided among his daughters, and paid to them when they respectively attain eighteen years.

It was uncertain which of these funds would exist before Julia attained eighteen; or whether either or both; and in this uncertainty they are both subjected to the same rule. The rule was well suited to the one fund, *i. e.*, the fund to arise from the sale of the personal property on the death or marriage of the widow before Julia attained eighteen. It may not have been so well suited to the other fund, *i. e.*, the fund which might arise from the sale of the Read farm before Julia attained eighteen. But I do not see that the court is called upon, or authorized, to make a new will for the testator, in this respect. By the sixth

---

Anderson et al. v. Hendrickson.

---

item, the proceeds are to be placed at interest. This could only refer to a sale that might be made before Julia attained eighteen; for, on her attaining that age, the widow's use ceased. The farm, if not sooner sold, was then to be sold; not for the purpose of putting the proceeds at interest for the widow, but for the purpose of dividing the proceeds among the girls. The frame of this item, thus far, brought to the consideration of the testator, distinctly, what should be done with the proceeds of the sale that might be made of the Read farm before Julia attained eighteen; the proceeds of which were directed to be placed at interest. Shall these proceeds not be divided till Julia attains eighteen? or shall each daughter have her share on attaining that age? The clause answers, they shall be equally divided among the daughters, and paid to them when they respectively attain eighteen.

I see no controlling reason why effect should not be given to this language; the only difference being, whether the widow should lose the interest of one-seventh of the proceeds, when each daughter should attain eighteen, or enjoy the interest on the whole till the youngest should attain that age. The second item of the will provides for the sale of certain movables, and that the proceeds of the sale, after paying, &c., be put at interest, and expressly directs that the interest thereof be paid annually to his wife during her widowhood. When, therefore, in the clause under consideration, the testator omits such provision, and employs language which, it is admitted, gives a different rule, it would be carrying construction too far to refuse to give effect to it. Would there have been any reasonable objection to the distribution clause if it had provided that each daughter should have her share on attaining twenty-one? Obligation for support would then cease. Shall we deny effect to the express language of the testator, because he chooses to consider eighteen as a proper age for distribution among daughters, or an age at which they are likely to provide for themselves, or be provided for?

Again, it might be that the homestead farm would be converted into money before Julia attained eighteen; for, if Benjamin died without issue before he attained twenty-one, the will directs the executors, or the survivor of them, to sell the home-



---

Anderson et al. v. Hendrickson.

---

stead, and put the proceeds at interest, and to divide the same among the daughters in the same manner as directed in reference to the proceeds of the Read farm; though, if Benjamin lived, the widow was to have the use of the homestead till he attained twenty-one. And this provision in reference to the sale of the homestead farm on Benjamin's death before twenty-one, without issue, is peremptory; yet the same rule is given as in reference to the Read farm, if that should be sold before Julia attained eighteen. Here the same question was brought to the testator's mind again, and he gives the same rule as to when and how the proceeds of this sale shall be divided among the daughters, *i. e.*, when they respectively attain eighteen.

I am of opinion that the decree of the Orphans' Court is erroneous; that each daughter, on attaining eighteen, was entitled to her share of the principal sum arising from the sale of the Read farm; and that the daughters who had attained eighteen at the time of the sale, were entitled to their shares immediately; and that, in reference to these last shares, the executrix should have been charged with interest thereon from the time of the sale. It will be decreed accordingly.

# CASES IN CHANCERY.

SEPTEMBER TERM, 1845.

---

GEORGE LOVETT v. DAVID D. DEMAREST AND WIFE AND  
ELIZABETH BOYD.

1. A sold a tract of land to B for \$9000; \$4000 to be paid on the delivery of the deed, and the balance of the consideration money to be secured by a mortgage on the premises. Before the deed was executed, it was agreed between the seller and purchaser and C, that if C would lend the purchaser \$2000, to enable him to make the cash payment of \$4000, a first mortgage on the premises should be executed by the purchaser to C for the \$2000 to be loaned by him, and that the mortgage to C should be first recorded. C loaned the \$2000, and the deed and mortgages were made accordingly; and the mortgage to C was first recorded. Afterwards A assigned his mortgage to the complainant. *Held* that C's mortgage was the first encumbrance.

2. A certificate of the clerk of the county, setting forth that the mortgage to A was the first and only mortgage on record, shown by A to the complainant when he took the assignment of A's mortgage, *held* not to have the effect of giving priority to the mortgage assigned to the complainant.

3. Every allegation of the answer which is not directly responsive, but sets forth matter in avoidance or bar, is denied by the general replication, and must be proved *aliunde*.

---

This is a foreclosure bill. It states that, on the 24th of May, 1836, one John De Groot sold and conveyed to the defendant David D. Demarest, the premises described in the bill, and that Demarest gave to De Groot his bond of that date for \$5000, part of the purchase money; and also with his wife, gave to De Groot the mortgage set forth in the bill, on the premises so sold and conveyed, to secure the payment of the bond. That the mortgage was recorded in the clerk's office of Bergen

---

Lovett v. Demarest et al.

---

county on the 28th of May, 1836. That, on the 3d of November, 1838, De Groot applied to the complainant to buy the bond and mortgage, representing it to be a purchase money mortgage, and a first lien of record on the premises, and ample security for the money mentioned therein. That the complainant, confiding in these representations, and being willing to purchase the bond and mortgage, De Groot thereupon, by assignment of that date, in consideration of \$5000 to him paid by the complainant, assigned the same to the complainant. That, on searching the records, preparatory to filing the bill, the complainant first learned that there was on record a mortgage of the same premises, given by Demarest and his wife to the defendant Elizabeth Boyd, for \$2000, purporting to bear date the same 24th of May, 1836, and to have been registered the 25th of that month. The bill claims that the last-mentioned mortgage is subsequent to the complainant's in fact and in law; and charges that Elizabeth Boyd took her mortgage with full notice of the mortgage of De Groot.

The answer of Elizabeth Boyd states that, before the day of the date of the mortgage to De Groot, Demarest applied to her to lend him \$2000, stating that he was about to buy the premises from De Groot for \$9000; that he was to pay \$4000 of the purchase money down; that he had but \$2000 in cash, and that if she would lend him \$2000, De Groot would agree that she should be secured by the first mortgage on the premises, and that De Groot would take a mortgage subsequent to hers for the remaining \$5000 of the purchase money. That, on these conditions, she agreed to loan Demarest the \$2000, to be secured by the first mortgage on the premises. That De Groot agreed with her agent, appointed by her to conclude the loan and take the security, that, if she would loan the \$2000, he would, on receiving \$4000 of the purchase money, accept for the residue of the purchase money a mortgage subsequent to the mortgage to be given to her at the same time, stating that, unless he could get \$4000 of the purchase money in cash, he could not procure a release of the claim of the receivers of the Washington Bank on the premises. That, thereupon, it was agreed by De Groot, Demarest, and her, that she should loan the \$2000 to Demarest; that this sum,



---

Lovett v. Demarest et al.

---

with 2000 dollars more to be paid by Demarest, should be paid to said receivers to procure a release from them to De Groot, and that on the delivery of the release, De Groot was to convey the premises to Demarest; and that thereupon Demarest and his wife should secure this defendant by the first mortgage on the premises, and after that should give De Groot a mortgage on the premises for 5000 dollars, the residue of the purchase money. That in pursuance of said agreement, she, on or about the 24th of May, 1836, lent and advanced to Demarest the 2000 dollars, which, with 2000 dollars more advanced by Demarest, was paid to the said receivers, whereupon they delivered their said release to De Groot, who thereupon executed and delivered to Demarest a deed for the premises; and thereupon Demarest gave his bond to this defendant, dated the said 24th of May, 1836, conditioned for the payment of 2000 dollars, with interest, on or before the 1st of May then next, and a mortgage of the premises of the same date, executed by him and his wife, to secure the same. That said bond and mortgage were delivered to her, in the presence of De Groot, before the bond and mortgage set forth in the complainant's bill were executed or delivered to De Groot; and that De Groot, after the mortgage to him was executed and delivered, signed a writing endorsed on this defendant's mortgage, by which he acknowledged that the mortgage of this defendant was prior in point of date and lien to the mortgage to him, and was to be first paid; and that for greater certainty, and that the priority of this defendant's mortgage might be manifest to all, the said De Groot agreed not to deposit his mortgage in the clerk's office for registry until some day after this defendant's mortgage should be so deposited. That the execution of her mortgage was duly acknowledged on the day of the date thereof, and was received in the clerk's office on the 25th of that month, and was duly registered by the clerk. That she has no knowledge of the assignment to the complainant, of the said mortgage to De Groot, nor of the representation made at the time thereof, by De Groot to complainant, except by the complainant's bill.

The defendant Demarest, in his answer, states that the mortgage to Elizabeth Boyd was given to secure 2000 dollars loaned by her to him, to pay De Groot on the purchase of said

---

Lovett v. Demarest et al.

---

premises; and that he and his wife, by an arrangement and the express consent of De Groot, and in his presence, executed and delivered to Elizabeth Boyd the said mortgage to her, before the execution and delivery of the mortgage to De Groot; and that this \$2000 was paid by him to De Groot, as part of the purchase money for the premises.

And this defendant, by way of defence against the mortgage to De Groot, in the hands of the complainant, denies that the assignment thereof to the complainant was in consideration of 5000 dollars paid by complainant to De Groot; but says the said assignment was made in pursuance of a usurious contract between De Groot and the complainant, by virtue of which the complainant loaned and advanced to De Groot, partly in money and partly in securities for money, a large part of which proved worthless, 4500 dollars, for which De Groot assigned to the complainant the said bond and mortgage, and also guaranteed and became personally responsible, by writing under his hand, to the complainant, that the complainant should recover and receive from said bond and mortgage, the principal sum of 5000 dollars, with interest at six per cent.; and that said 4500 dollars was advanced to De Groot by the complainant, in money and securities as aforesaid, upon the said contract and agreement that De Groot should assign the said bond and mortgage and guarantee the same as aforesaid; and claims that thereby the said contract and assignment were rendered usurious and void; and says that De Groot has notified him of the circumstances under which said assignment was made, insists that said assignment is usurious and void, and claims said bond and mortgage as his own property, as if no assignment thereof had ever been made.

Both mortgages were acknowledged on the day of their date, before A. O. Zabriskie, master in chancery.

Evidence was taken, and a writing endorsed on the mortgage to Elizabeth Boyd, and signed by De Groot, dated May 24th, 1836, acknowledging that her mortgage was the first lien on the premises, and was to be paid before the mortgage given to him on the same premises was exhibited.

*J. D. Miller*, for the-complainant, cited 2 *Johns. Ch. R.* 603; 15 *Ib.* 458.

---

Lovett v. Demarest et al.

---

A. O. Zabriskie, for the defendants, cited 1 *Green's Chan. R.* 42, 161, 335; 2 *Harrison* 191.

THE CHANCELLOR. The facts set forth in the answer of Elizabeth Boyd, on which the priority of her mortgage is claimed, are fully proved by the testimony of A. O. Zabriskie, esquire, who drew and witnessed the execution of both bonds and mortgages, and before whom both mortgages were acknowledged, and who was also one of the receivers of the Washington Bank; and by the writing signed by De Groot and endorsed on the mortgage of Elizabeth Boyd. There can be no doubt that under these circumstances the mortgage of Elizabeth Boyd is the prior lien. Though the mortgage to De Groot was for a part of the consideration money for which he sold the premises to Demarest, yet he might agree that Demarest should first execute and deliver to another a mortgage on the same premises, and that such prior mortgage should be first recorded. If by collusion between Demarest and Elizabeth Boyd, a mortgage had been made by Demarest to her without De Groot's knowledge, and for the fraudulent purpose of interposing a prior lien, a court of equity would relieve; but here, the arrangement was made by De Groot's express consent, and was, to the knowledge of De Groot, the inducing cause or reason of the loan by Elizabeth Boyd to Demarest. It would be a fraud on her to permit De Groot to postpone her claim; nor can her claim be postponed in favor of De Groot's assignee. Her mortgage was first recorded, and it was so recorded by the consent and agreement of De Groot.

The evidence of Lewis B. Cobb, that when the assignment by De Groot to complainant was made, De Groot produced a paper purporting to be a certificate of the clerk of Bergen, setting forth that the mortgage assigned was the first and only mortgage, if at all competent, could not avail the complainant. That paper was taken away by De Groot, and is not produced in evidence. But if the clerk gave any such certificate, it could not affect the mortgage of Elizabeth Boyd, if it was contrary to the fact.

Demarest, the mortgagor, sets up in his answer that the assignment to the complainant of the De Groot mortgage was



---

Lovett v. Demarest et al.

---

usurious. That De Groot, when he made the assignment, gave his personal guaranty, by writing under his hand, to the complainant, that the complainant should receive from the said bond and mortgage the whole sum mentioned therein, and interest; that this guaranty made the assignment usurious, and that no decree should be made in favor of the complainant. No such guaranty appears in the written assignment, and no proof of any guaranty is made in the cause. The counsel for Demarest contends that the allegation to that effect in Demarest's answer is sufficient proof of the fact, unless disproved by testimony on the part of the complainant. This position cannot be maintained. A replication was filed. The complainant proves and produces the mortgage and an assignment thereof to him, in which no guaranty appears; and the defendant gives no evidence whatever of the allegation in his answer. The cases cited by the defendant's counsel from 1 *Green*, cannot be supposed to sanction the idea that, under such circumstances, the allegation of the answer is sufficient to establish the fact of usury. If a complainant sets down his cause for hearing on bill and answer, the answer is evidence of the facts set up in defence; but matters respecting which no inquiry is made by the bill, and which are set up in the answer in avoidance or in bar, are denied by the replication, and must be proved *aliunde*.

There is no proof, therefore, before the court, of the guaranty, on the allegation of which the defence of usury is set up.

This makes it unnecessary to consider whether the principle adopted by our Supreme Court in the case of *Freeman v. Brittan*, in reference to usurious endorsements of commercial paper, would be applicable to this case if the guaranty was proved.

A decree will be made for the sale of the premises, to pay, first, the mortgage to the defendant Elizabeth Boyd, and, next, the mortgage held by the complainant.

---

Williams v. Adm'r of Stevens.

---

## JONATHAN H. WILLIAMS v. PHILIP KINGSLEY, ADMINISTRATOR, &amp;c., OF NATHANIEL STEVENS, DECEASED.

1. One of two partners, being about to leave the state for his health, assigned to the other partner a bond and mortgage he held against a third person. He died while absent. The administrator of his personal estate sued the surviving partner for the amount of the bond and mortgage. On a sworn bill, filed by the surviving partner, stating that the deceased partner, when he left, was debted to the partnership in more than the amount of the bond and mortgage, and that it was agreed between them that they should be applied to the purposes of the partnership (stating how), and that he had so applied them, the administrator was enjoined from proceeding in the suit.

2. The facts on which the equity of the bill rested, were not charged to be within the knowledge of the administrator. A motion to dissolve, on his answer, was denied.

3. Insufficiency of answer in other respects.

---

Jonathan H. Williams, the complainant, and Nathaniel Stevens, since deceased, in May, 1835, entered into partnership in the hatting business, the business to be carried on in the name of the complainant. On the 1st of January, 1839, the complainant and Stevens came to a settlement of the partnership business up to that time, on which settlement Stevens was found to be indebted to the partnership in \$1541, and the complainant to be indebted in \$213. The partnership business continued till the death of Stevens, at St. Augustine, in November, 1839. On the 8th of October, 1839, Stevens, being about to leave this state for St. Augustine, for his health, assigned and delivered to the complainant a bond and mortgage, given by one William Bodwell to him, Stevens, on which there was due of principal and interest, \$640. Stevens died while absent. In January, 1841, administration of his goods, chattels, &c., was granted by the surrogate of Essex county, in this state, to Philip Kingsley, the defendant. The defendant, as such administrator, brought an action of *assumpsit* against the complainant, to recover the sum due on the bond and mortgage when the same was assigned to the complainant. The complainant, in February, 1843, filed his bill, stating, in addition to the foregoing facts, that the settlement in January, 1830,

---

Williams v. Adm'r of Stevens.

---

was made at Stevens' house, and that a particular statement thereof was then made, and left with Stevens; that a note of the settlement was made in the books of account of the partnership, and signed by the complainant and Stevens at the time, but that said books are in the possession of the widow of Stevens; that when the bond and mortgage were assigned, Stevens owed the partnership more than the sum due thereon; and that it was then understood and agreed that the bond and mortgage should be collected or disposed of by the complainant, to pay the debts and carry on the business of the partnership, and, particularly, that a debt of \$500, then due from the partnership to said Bodwell, should be discharged from the amount due on said bond. That the complainant, in January, 1840, settled with Bodwell, and allowed him his demand against the partnership, towards payment of his said bond and mortgage, and received from him the balance due thereon. That after the death of Stevens, the complainant, as surviving partner, paid all the debts of the partnership, and collected debts and disposed of the stock in trade, which was of small value. That the defendant, as such administrator, compromised and settled a debt due the partnership from Ransom & Company, of New York, of \$386, besides interest, and received fifty cents on the dollar therefor, and that he may have received other debts, and prays a discovery. That the complainant and defendant are unable to agree on a settlement, the defendant insisting that the complainant is bound to pay to him the principal and interest of the said bond and mortgage. That Stevens, at the time of his death, was indebted to the complainant on a note given by him to the complainant, dated May 14th, 1835, payable at ten months, for \$500, and that the same, with the interest thereon, is still due. That on a just settlement of the accounts of the partnership, crediting the estate with the said bond and mortgage, there would be due the estate of Stevens, about \$21, without allowing the complainant anything for his expenses and pains in settling the partnership estate; and that if the said note of \$500, with the interest thereon, be taken into the account, there would be due the complainant upwards of \$700. The bill claims that the amount due on the said bond and mort-



---

Williams v. Adm'r of Stevens.

---

gage when the same were so assigned, should be settled with and as part of the partnership accounts, and not be considered an individual debt due from the complainant to the estate of Stevens ; and prays an account of the partnership transactions, and of all moneys received by the defendant from the partnership effects ; and that, in the meantime, the said suit at law may be enjoined.

The injunction prayed was granted.

The defendant put in an answer to the bill. The only parts of the answer which need now be stated are as follows : It admits that in January, 1839, Stevens and the complainant made some settlement or adjustment of their business up to that time ; and that from entries in one of the books of account, signed by the complainant and Stevens, on settlement then made between them, respectively, and the shop, there was due from Stevens \$1541.60, and from complainant \$213.32. That the business was carried on, after that settlement, till the death of Stevens ; that the books of account relating to the business are in his, the defendant's, possession ; and states that from the entries in said books, up to the time of the death of Stevens, on a fair settlement of the accounts, there is nothing due from Stevens on account thereof. The answer further states that Stevens, previous to leaving the state, placed in the hands of the complainant the Bodwell bond and mortgage, to be collected by the complainant for his use, and took the complainant's receipt for the same, which is now in his, the defendant's, possession, ready to be produced, &c. ; and denies that said bond and mortgage were assigned and delivered to the complainant, to be collected and disposed of by him for the purpose of paying the debts of the partnership, or carrying on said business ; and denying any agreement or understanding between Stevens and the complainant, that \$500 and upwards should be paid or allowed to Bodwell from the amount due on said bond and mortgage, or any agreement to that or the like effect.

The answer denies that the defendant and complainant were unable to agree on a settlement, and says that, on the contrary, they did agree upon a settlement, and that on or about the time of the settlement made by him, the defendant, with Ransom &

---

Williams v. Adm'r of Stevens.

---

Company, the complainant and the defendant settled all the accounts and transactions in relation to said business carried on between the complainant and Stevens ; and that since the said settlement, the complainant has admitted that there was no dispute about the said Bodwell bond and mortgage, and that he was to pay the amount received on the same to the defendant, as administrator, &c., of Stevens.

The answer says it may be true that the complainant has in his possession the promissory note made by Stevens, mentioned in the bill, but denies that it is justly owing to the complainant ; that the complainant, in all his transactions with the defendant in relation to the settlement of the business between the complainant and Stevens, never informed the defendant of the existence of said note, or made any claim for the same ; and the defendant insists that, if any such note exists, it is fraudulent and void, and has long since been paid off and satisfied, and is kept on foot by fraud.

The defendant says that after the death of Stevens, the complainant caused entries to be made in the books, giving himself large credits on account of said business, to which he is not fairly entitled ; and that on examining said books he, the defendant, has been unable to find therein any credits given to Stevens for the said bond and mortgage.

On this answer, a motion was made to dissolve the injunction.

*S. R. Grover*, for the motion.

*A Whitehead, contra*, cited 1 *Paige* 100, 426 ; 3 *Ibid.* 42, 436 ; 2 *Johns. Ch. Rep.* 204 ; *Hopk.* 148 ; 1 *Green's Ch. Rep.* 193, 436 ; *Dev. Eq.* 429.

THE CHANCELLOR. The leading facts on which the equity of the bill rests, are, that on the 1st of January, 1839, a settlement of the business up to that time was made between the complainant and Stevens, by which Stevens was found to be indebted to the partnership in 1541 dollars, and the complainant to be indebted to the partnership in 213 dollars and 28 cents, a particular statement of which settlement was left with

---

Williams v. Adm'r of Stevens.

---

Stevens, and a note of which was made in the books of the partnership, and signed by the complainant and Stevens; that the said books are in the possession of the defendant; that the business was continued after that settlement, till the death of Stevens, which occurred at St. Augustine, Florida, whither he had gone for his health, in November, 1839. That on the 8th of October, 1839, shortly before he left this state for St. Augustine, Stevens assigned and delivered to the complainant a bond and mortgage given by one Bodwell to him, on which 640 dollars was due, which it was then understood and agreed should be collected or disposed of by the complainant, to pay the debt and carry on the business of the partnership; and particularly that a debt of 500 dollars, due from the partnership to Bodwell should be settled; that the complainant settled with Bodwell the said debt, with the bond and mortgage, and received from him the balance. That after the death of Stevens, the complainant paid all the debts of the partnership; and that on a settlement of the partnership accounts, after crediting Stevens with the amount of the bond and mortgage, there would be due Stevens about 21 dollars, without allowing the complainant anything for his expenses and pains in settling the partnership business. That Stevens, at the time of his death, was indebted to the complainant, on a promissory note given by him to the complainant, dated May 14th, 1835, payable in ten months, for 500 dollars, which, with the interest thereon, is still due and unpaid.

The bill prays an account of the partnership affairs, and an injunction against further proceedings in a suit brought by the defendant, as administrator, &c., of Stevens, against the complainant, to recover the amount which was due on the said bond and mortgage when the same was so assigned to the complainant.

The indebtedness of Stevens to the partnership in January, 1839, is admitted. How, and for what purpose, was the Bodwell bond and mortgage assigned to the complainant? Was the assignment general and absolute, or was it special? From the language of the bill, I should understand that the assignment was in the usual form, absolute, and that there was an understanding or agreement, not appearing in the written assign-



---

Williams v. Adm'r of Stevens.

---

ment, that the bond and mortgage should be collected or disposed of for the purpose of the partnership, as stated in the bill. The defendant, having no personal knowledge of the transaction, denies that they were to be so applied, and insists that they were to be applied to Stevens' individual use and benefit, and says that he has in his possession the complainant's receipt for the same, but he does not set out the terms or the contents of the receipt.

The terms of this receipt might have aided much in the decision of the question now before the court. If it would show that the complainant agreed to account with Stevens, individually, for the proceeds of the bond and mortgage, more should have been said in the answer about it, than simply that Stevens took the complainant's receipt for the bond and mortgage. If the assignment of the bond and mortgage was general and absolute, the receipt must have been taken for some purpose, and that purpose, it is presumed, would be stated in it; and if the administrator founds his denial of the charge, that the bond and mortgage were to be applied as stated in the bill, on information acquired from the receipt, he should have apprised the court of the terms of the receipt. The mere denial of an administrator having no personal knowledge of a transaction between his intestate and a complainant, is not sufficient to dissolve an injunction.

The bill states that at the time of the assignment of the bond and mortgage, Stevens was indebted to the partnership in a considerable sum, and more than the amount due on the bond and mortgage. The answer to this is a denial by the administrator that Stevens, when he left the state, was indebted to the partnership in a considerable sum; and a statement that he, the defendant, has heard and believes, that the complainant, since the granting of letters of administration to the defendant, and since the settlement stated in his answer to have been made between the complainant and defendant, admitted that there was no dispute about the bond and mortgage, and that he was to pay the amount he received on the same to the defendant, as administrator of Stevens. This denial is insufficient, and is not aided by the hearsay set up in the answer.

To the charge in the bill, of the indebtedness of Stevens, and

---

Williams v. Adm'r of Stevens.

---

the amount thereof, to the partnership, at the time of the assignment of the bond and mortgage, the defendant admits that the books of account are in his possession, and says that, from the entries in the said books up to the time of the death of Stevens, on a fair settlement of the accounts respecting said business, there is nothing due from Stevens on account thereof. What are we to understand by the fair settlement the defendant here speaks of? The bill states that the complainant and defendant are unable to agree on a settlement, the defendant insisting that the complainant is bound to pay him the principal and interest of the bond and mortgage. The answer says that the complainant and defendant did agree on a settlement. What was settled? It appears to me that the answer, examined in reference to the charges of the bill, is not sufficient to show that this matter of the bond and mortgage was ever settled between them. When the defendant, in his answer, says that he and the complainant agreed to settle all the accounts and transactions in relation to said business, he may mean all the accounts and transactions that *he* supposed belonged to said business. Did they settle all matters which the complainant claimed to belong to the partnership accounts? Did the complainant *then* admit that the bond and mortgage did not belong to the partnership business? If he did, it would not have been necessary for the defendant, in his answer, to resort to the statement that, since the settlement, the complainant had admitted that he was to pay to the defendant the amount of the bond and mortgage.

It is manifest that whatever may have been said or done at any settlement, or attempted settlement, the parties are still at variance as to how the bond and mortgage are to be accounted for; and we are brought back to the inquiry for the terms of the receipt, which the defendant says he has in his possession. Again, if there was a full settlement between these parties, the posture of their affairs, and particularly the character in which the defendant was acting, would lead us to expect some written evidence of it.

In view of the whole case, I think it would not be a safe exercise of discretion to dissolve the injunction.

Motion denied.

---

Society for Establishing Manufactures v. Holsman.

---

THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES  
v. CATHARINE HOLSMAN ET AL.

In 1813, the Society for Establishing Useful Manufactures sold a lot in Paterson, "together with the right of taking from their canal twelve inches square of water." A mill was shortly after erected on the lot, and water was drawn from the canal for supplying it, without the use of any means for accurately measuring the quantity drawn. In 1827, the society gave a notice to the owner of the mill, that he had reason to believe he was taking more than the said quantity of water, and requesting him to confine his future use of water to that quantity. The owner of the mill, in answer to the notice, said he was not using more than the one foot of water. In December, 1843, a like notice was given and request made. The owner did nothing to limit the flow. In April, 1844, the society built a stone wall in their canal, opposite the head-race leading the water on the lot, and placed in the side of the wall a piece of cast iron, with an aperture in it of twelve inches square, for the flow of water into the head-race, and, thereupon, the owner of the mill prostrated the said wall. A motion for a preliminary injunction, restraining the owner from taking more water than will run through an aperture of twelve inches square, and from pulling down or taking out any gauge which the society might insert for the purpose of measuring twelve inches square of water, was denied.

The bill states that the Society for Establishing Useful Manufactures, the complainants, on the 20th of January, 1813, sold and conveyed, by deed, to Roswell L. Colt, a mill lot on Boudinot street, Paterson (describing it), "together with the right of taking from their canal in Boudinot street aforesaid, twelve inches square of water, say one hundred and forty-four square inches," for the consideration of \$2500. That on the 3d of February, 1813, Colt, with his wife, conveyed the said lot and water-power to one David Parish. That Parish, by deed of November 12th, 1813, conveyed said lot and water-power to Daniel Holsman, with the buildings and improvements erected on said lot. That Parish or Holsman erected on said lot a mill, which has ever since been used for the manufacture of cotton. That Holsman owned said premises, and occupied them by himself or his lessees, till his death, in October, 1840, intestate, leaving Catharine Holsman, his widow, and six children, his heirs-at-law, and minors, and that said Catharine Holsman has taken letters of



---

Society for Establishing Manufactures v. Holsman.

---

administration. That neither Colt, nor Parish, nor Holsman, ever had or claimed any legal right to a greater quantity of water to be used on said lot, than was granted by the said deed from the society. That on or about December 7th, 1827, the complainants gave a notice in writing to said Daniel Holsman, that by virtue of the deed under which he occupied the said lot and water privileges, he was entitled to take from the canal on Boudinot street twelve inches square of water, say 144 square inches; that the society considered that the said quantity of water was to be ascertained at the canal from which it was taken, in Boudinot street; and that, as they had reason to believe that the quantity of water then taken by him exceeded the said quantity, they felt it to be their duty to give him that notice, and to request him to confine his future use of the water within the terms of the said deed. That Holsman, on receiving said notice, did not pretend that he had any right to more than one foot of water; but that he then declared that he did not use more than one foot of water on the said lot. That after Holsman's death, his widow leased the lot and water power to Joseph Stark and William Parsons, and while they occupied the premises, the complainants gave another notice directed to Catharine Holsman, administratrix of Daniel Holsman, deceased; this notice was the same as the other, with the addition of these words: "by placing a cast iron aperture of twelve inches square, or in such other way as shall limit the quantity of water taken to the amount granted, strict measure;" and requiring it to be done by the first day of April, then next, or that the society would feel itself compelled to apply to the proper tribunal for redress. This notice was dated December 26th, 1843, and a copy of it was left with Stark and Parsons, on the premises, on the 28th of that month. That thereupon, the said Stark applied to the complainants, and verbally agreed to hire of them an additional square foot of water, to be used on said lot, for about ten months, the time during which his lease was to run, for \$400, and agreed that a cast iron gauge should be inserted, so as to draw but two square feet of water. That thereupon the said Catharine Holsman interfered, and forbid Stark from hiring said foot of water. That Stark and Parsons, during their lease, which expired in February, 1845, continued

---

Society for Establishing Manufactures v. Holsman.

---

to draw from the race on Boudinot street about three feet of water, and that Parsons, who then hired and still occupies the premises, has continued to do so.

That after the said last-mentioned notice was so given, the complainants received a notice, dated March 26th, 1844, signed C. Holsman, administratrix of Daniel Holsman, deceased, and guardian of his minor children, by which the society, and all persons acting for or under them, are notified to desist from placing any gauge or other obstruction, to prevent or diminish the flow of water from the canal or raceway in Boudinot street in and upon the said lot, and from using any means or device to cause a less quantity of water to flow into and upon said lot, than has been accustomed to flow thereon. That to prevent the use on said lot of more than twelve inches square of water, the complainants, on the 10th of April, 1844, built a stone wall in the canal on Boudinot street, on their own land, opposite the head-race where the water is taken from said canal across said lot, and fastened therein, on a level with the bottom of said canal, a cast iron aperture of twelve inches square in the inside, sufficient for the flow of the exact quantity of water to be used on said lot; and that thereupon certain persons, acting under the orders of said Catharine, entered on complainants' land and prostrated the said wall, though forbid so to do by the complainants. That the complainants can safely agree to furnish from the said canal only 22 square feet of water, and that they have leased, agreed to lease, or sold, including the one foot so sold to be used on said lot, 22 square feet, to be taken from said canal; and that, if there shall be a scarcity of water, the complainants fear, if the occupants of said lot continue to draw more than a foot square, the complainants will be subjected to suits for damages, by others to whom they have leased, or agreed to lease, or sold the use of water. That the occupants of said lot now use about three square feet of water, and refuse to allow the water to be gauged or measured. That the complainants have lately leased several feet of water, to be taken from said canal, at \$500 and \$600 per annum per square foot, and have lately leased surplus water, to be taken from said canal, over and above the 22 square feet, at \$500 per annum per square foot, on certain conditions; and that, if

the occupants of said lot shall be permitted to draw more than a square foot, the complainants, in a time of scarcity, will be subject to suits for damages on their covenants in said leases; and that the complainants are prevented from selling or leasing more of said surplus or contingent water, by reason of the occupants of said lot using more than they are entitled to. That the complainants have commenced a suit in the Supreme Court against said Catharine Holsman, in her own right and as guardian of said infant children, to recover damages for the use of more than a square foot of water on said lot, which suit is pending and undetermined. The said Catharine, widow, administratrix and guardian as aforesaid, and the minor children of Daniel Holsman, deceased, and William Parsons, are made defendants; and the bill prays that the defendants may answer, &c., and that the said Catharine, in her own person, and acting as guardian as aforesaid, and administratrix as aforesaid, and the said Parsons, may be enjoined from taking from the said canal any more water than will run through an aperture of twelve inches square, and from pulling down or taking out any gauge which the complainants may insert for the purpose of measuring the said twelve inches square of water; and that this court may direct in what manner the said twelve inches square of water shall be gauged or measured; and for such other and further relief, &c.

On the reading of the bill, an order was made, on motion of the complainants' counsel, for the hearing of the parties on an application for an injunction, as prayed by the bill, on notice to the defendants. The defendants thereupon put in their answers, which were read at the hearing.

The answer of Catharine Holsman, for herself and as administratrix and guardian as aforesaid, admits the conveyances stated in the bill, and states the consideration of the deed from Colt to Parish to have been \$3750, and the consideration of the deed from Parish to Holsman to have been \$12,000; and states that the last-mentioned deed conveys the water power and appurtenances in the following words, to wit: "Together with the right of taking from the canal aforesaid, twelve inches square of water, (say equal to 144 square inches of water,) together with all and singular the buildings and improvements, ways, passa-



---

Society for Establishing Manufactures v. Holsman.

---

ges, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances thereunto belonging, or in any wise appertaining." That she has heard and believes, that the channel through which the water flows across the premises to the mill thereon, was constructed before Holsman bought the premises, and that the water flowed through said channel before he bought, and has ever since continued to flow through the same, in the same manner it did at the filing of the bill and now does; that the cotton mill on said lot was built by Parish while he owned the lot, and has always been driven by the water flowing through said channel, ever since it was first put in operation. She admits that on the 19th of October, 1841, she leased to Stark and Parsons the said lot and premises, except a strip of thirty-five feet wide on the eastern side thereof, for three years; and that on the 28th of December, 1843, the notice stated in the bill to have been left at the office of Stark and Parsons on the premises, was so left. That she has heard and believes, and therefore admits, that Stark applied to the complainants to hire an additional foot of water, but that she has no knowledge of any agreement by Stark, that a cast iron, or any other gauge, should be inserted, to measure or limit the flow of water through its accustomed channel; and that such application and agreement, if any were made, were made without her knowledge or consent, and contrary to her wishes. That after the lease to Stark and Parsons expired, Parsons continued in possession under a parol agreement for a lease, and is still in possession. That being informed that the complainants threatened, and were preparing to obstruct and limit the flow of water through said ancient channel, so as to cause a less quantity to flow than had been customary for more than thirty years, she gave the notice to the complainants stated in their bill. That she believes, and therefore admits, that the complainants never leased or sold, to Colt, Parish or Holsman, or any other person, to be used on said lot, any other water-power than that described in the deeds before mentioned. She admits the building of the stone wall and placing the gauge therein by the complainants, as stated in the bill; but says she is informed by competent judges, and believes and charges, that the same was so placed as not to admit the passage of more than

half the water that would flow through the same gauge, if placed in a proper position for gauging a foot of water on the same level; and she admits that, for the reason that she did not believe the society had any right to place a wall or gauge in that or any other place that would obstruct, diminish, or alter the flow of water through said channel, she caused said wall and gauge to be removed, so as to leave the said channel communicating with said canal, as the same had heretofore been, doing no unnecessary damage. That she has no knowledge of the quantity of water used on the premises, but is informed and believes that the channel which draws the water is the same as it has been for thirty years prior to the filing of the bill; and that no more water passes through the same than has been accustomed to flow through it for the said period of thirty years. She denies that Holsman never claimed a right to more than one square foot of water, if more than that has been accustomed to flow on and over said lot, and alleges that Holsman, at all times, claimed a right to all the water that was accustomed to flow through the said channel. She says she has no knowledge how much water the complainants can agree to furnish on said canal, nor how much they have sold, leased, or agreed to lease; nor what quantity of machinery was in the mill on said lot when Holsman took possession thereof under the deed to him; nor what machinery, if any, he put therein from time to time; nor what machinery Stark and Parsons, or Parsons, used therein, other than that they used a part of the same machinery that was therein at the death of Holsman; nor what quantity of water is required to drive said machinery successfully. That when Holsman entered, the channel through which the water now flows upon said lot, was open, and was and ever since has been of the same size, and the same, in all things, as it is now; and that the customary flow of water through said channel has been the same from that time to the present, excepting some diminution thereof, for several years last past, caused by the water in said canal being, during that time, considerably lower than it had heretofore been, and that the possession of said mill lot and channel, and the use of said water, has been uninterrupted, and has, at all times, been under a claim of title to the said mill, lot, and channel, and to the

---

Society for Establishing Manufactures v. Holsman.

---

use of all the water flowing through and over the same, and adverse to any claim or right of the complainants, or of any other person thereto.

That she is informed and believes and charges that, at the several times of the said several conveyances to Colt, and to Parish and to Holsman, and for a long period subsequent thereto, the usual height of water in the canal was materially greater than at the time of the filing of the bill, and now is and has been, on an average, for more than a year last past; and that, by reason thereof, the quantity of water that would flow through a given aperture on the bottom of the canal, would now be much less than at the before-mentioned periods; and that, by reason thereof, it would be contrary to equity, even in the absence of any title in the defendants to the customary flow of water in the said channel, to restrain them, by injunction, from using more than a square foot of water, without first requiring the complainants to raise and keep the water in said canal at its former level.

The answer of Parsons was also put in, and was read at the hearing, by consent of counsel, for such (if any) consideration as the court should think it entitled to. He admits that, in February, 1842, Catharine Holsman leased the mill, machinery, and water-power to him and Stark, for three years, and that they ran the mill during that time. That before the expiration of their lease, the complainants gave to Mrs. Holsman the notice stated in the bill; that, thereupon, he and Stark verbally agreed to lease of the complainants an additional square foot of water, at \$400 for about ten months, and that a gauge should be inserted so as to draw but two square feet; but that said Catharine forbid them from so doing, and from allowing the water to be gauged or measured; and that, thereby, the said negotiation was broken off. He admits that, while he and Stark occupied, they used more than a square foot of water, and, as he thinks, between two and three square feet, but says he has never gauged or measured it; that, since the expiration of the lease, he, occupying under said Catharine, has used about the same quantity of water that was used by him and Stark; that he is willing, and always has been, to pay the complainants for whatever water he might use on said lot over



and above a square foot ; but that he has been prevented from doing so by the opposition of the said Catharine.

He admits that the complainants gave the notice stated in the bill, and built the wall, and inserted the cast iron aperture, as stated in the bill ; and that the same was prostrated by the order of said Catharine Holsman.

*A. S. Pennington* moved for the injunction. He cited 19 *Vesey* 155 ; 1 *Harrison* 344 ; *Blanchard on Limitations* 14 ; 2 *John. Ch. Rep.* 164 ; 4 *Ib.* 293 ; 1 *Scho. and Lef.* 8 ; *Greenleaf's Evid.* 125 ; 8 *Cowen* 589, 603 ; 1 *Paige* 447.

*Barkalow* and *P. D. Vroom, contra*, cited *Saxton* 518, 718 ; *Eden on Inj.* 138, 139, 390 ; *Ib.* 104 ; 3 *Pick.* 269 ; 8 *Ib.* 509 ; 16 *Ib.* 241 ; *Angell on Water Courses* 93 ; 6 *East* 208 ; 1 *Campb.* 163 ; 4 *Mason* 402 ; 4 *Wash. C. C. R.* 607 ; 2 *Vern.* 390 ; *Adam's Eject.* 51. 486 ; *Cro. Jac.* 126 ; 6 *Ves.* 51, 147 ; 1 *Brown's Ch.* 588 ; 2 *Ib.* 65 ; 1 *Coxe* 102, 103 ; *Jeremy's Eq. Jur.* 310 ; 18 *Ves.* 516 ; 6 *John. Ch. Rep.* 19 ; 4 *Ib.* 21 ; 3 *Halst.* 139 ; 3 *Paige* 214 ; 1 *Bay* 375 ; 2 *Penn. R.* 452.

THE CHANCELLOR. The nature of the case presented by this bill, as well as the prayer of the bill, shows that the permanent relief sought by the complainants is, that the owners and occupants of the premises be confined, in their use of water thereon, to the quantity that will run through an aperture of twelve inches square ; and to that end the bill prays that this court may direct in what manner the said twelve inches square of water shall be taken from the canal on Boudinot street, and in what way the same shall be gauged or measured ; and that the owners and occupants be enjoined from taking more water, or from taking the quantity in any other manner, or by any other mode of measurement, than shall be directed by the court.

The relief sought is resisted on one main ground, from which two positions of defence are taken by the answer of the widow and administratrix and guardian of the minor children.

That ground is, that the quantity of water now drawn from

---

Society for Establishing Manufactures v. Holsman.

---

the canal is the same as was originally drawn under the deed from the society, and that the mode of drawing it is the same, and that both the quantity drawn and the mode of drawing it have continued the same during the thirty years or more that have since elapsed.

This ground is relied upon, first, as evidence of right to the quantity drawn, even as against the deed, if it should appear that more than the quantity mentioned in the deed is drawn; and, second, as evidence that the particular mode used of taking the water was adopted and assented to as a sufficiently accurate mode of drawing the quantity of water mentioned in the deed.

These positions involve so much for consideration and decision, that it will hardly be expected that the court will finally decide upon them on the bill and answer. If I were willing now to say that a new mode of drawing the water should be adopted, there is not enough in the bill and answer to enable me to direct the proper mode of drawing the specified quantity. This belongs to the permanent relief sought by the bill, if the complainants finally prevail.

From the nature of the element we are to deal with, and the want of any mode prescribed in the deed for taking the specified quantity, it is clear that the court will need, for the guidance of its judgment, facts and scientific information which the bill and answer do not give, and which can be furnished only by the testimony of witnesses.

If, as the complainants contend, the water should be drawn from their canal through an aperture of a foot square, where should the aperture be? in what part of the wall, in reference to the line of the current? under what head of water? Is the water to flow through the aperture against the resistance of water in the channel to the mill at the same level with the water in the canal, or is it to flow without other resistance than that of the air? What was the height of water in the canal when the grant was made?

It is clear that a final decision of the controversy cannot now be made; a perpetual injunction could not now be asked.

But the complainants ask that an injunction be now granted, to be hereafter made perpetual, or be dissolved, as the case shall

finally turn. In what terms should such injunction be expressed? Could it be in the language of the prayer, enjoining the defendants "from taking from the canal any more water than will run through an aperture of twelve inches square, and from pulling down and taking out any gauge which the complainants may insert for the purpose of measuring the said twelve inches square of water?" To this there are conclusive objections. First, it would be deciding in this stage of the cause, that a new mode of taking the water is now to be adopted, and that, notwithstanding the lapse of time, the defendants may now be restrained to strict measure. Next, it would be to declare that the complainants have the right to determine where the aperture should be, a position which, it is sufficient for me now to say, is at least doubtful. Indeed, it is opposed to the next branch of the prayer of the bill, which is that this court may direct in what manner the foot square shall be taken, and how it shall be measured. The counsel for the complainants, perceiving, no doubt, this difficulty, asked only that an injunction should go in the language of the deed, restraining the defendants from taking more than twelve inches square of water. This is still subject to the first objection above stated, and is also subject to another objection, arising from the position taken by Daniel Holsman, deceased, in 1827, when the first notice was given to him. The bill states that he then put himself on the ground that he did not use more than a foot square. Suppose, then, the injunction should go as asked by the counsel for the complainants, and the defendants should, notwithstanding, continue to use the water as it has heretofore been used, and an attachment should be applied for. Is there enough now before the court to enable it to determine that more than the foot square contemplated by the deed, if taken as it should be taken under the terms of the deed, is used? The court would be in the same difficulty on the application for an attachment, as it is now in, in reference to the principal points of controversy. Would the court, on that application, first direct the mode in which the water should be taken and measured, in order to see whether more than the proper foot square was taken, and thereby to determine whether the injunction had been disobeyed?



---

Society for Establishing Manufactures v. Holsman.

---

The answer of a mere tenant of the principal defendant, that he thinks he is using more than a foot square, though he has never measured it, would not be sufficient ground for an attachment.

I forbear entering at this time into an examination of the principal points of controversy in the case. I am satisfied that a state of affairs which has existed for thirty years, and in reference to which the remedy is such as must be applied if the complainants succeed, should not be disturbed by a preliminary injunction. No alteration of that state of affairs is threatened, or impending, and by the complainants' own showing, the same state of affairs has continued for eighteen years, or thereabouts, since they gave notice to Daniel Holsman to confine himself to the foot square, and since they received his answer that he was not using more; to say nothing of the right claimed from long user, if the quantity used should turn out to be more.

The late leases or agreements to lease, or sales, by the company, stated in their bill, are not considered as making any such alteration in the state of affairs between the complainants and the defendants, as can be regarded on this motion.

The injunction is denied.

---

Van Hook v. Somerville Manufacturing Co.

---

## WILLIAM VAN HOOK v. THE SOMERVILLE MANUFACTURING COMPANY ET AL.

1. The act incorporating the Somerville Manufacturing Company provides that the stock, property and concerns of the company shall be managed and conducted by five directors, one of whom shall be president; and that the president and directors, or a majority of them, shall and may appoint such officers, superintendents and agents as they may think proper; and that the president and directors, or a majority of them, shall have power to call in installments on the stock. Can two of three directors assembled make a mortgage of the lands of the company?

2. Can two of three directors assembled make a mortgage to the third?

3. The book of minutes of a corporation is only *prima facie* evidence of the correctness of the entries made in it. The appearance of the minutes may, of itself, raise so strong a suspicion against the regularity of the proceedings, that no weight will be given to them.

4. The corporate seal may be affixed by a less number of directors than is necessary to constitute a board, if it be done by the direction of a legal board.

5. If, on a notice to all the directors, a meeting be held at which some of them do not attend, and an adjournment is made to a subsequent day, is the meeting on the subsequent day a meeting on due notice to all the directors?

6. The consent of a director not sitting in a legal board is nugatory.

7. If a mortgage be given, even by a competent board of directors, to one of their number, who is the financial agent of the company, to enable him to raise money for the company, on his representation that the money needed by the company could not be raised on the bond and mortgage of the company given directly to any lender; or after failure so to raise money for the company, and on his representation that he could raise the money on a bond and mortgage of the company executed to him, by an assignment of it, allowing a greater rate of interest than the legal interest, it would be a fraud on the company to enforce the mortgage against them as a mortgage to him for his own use and benefit, and if he attempt to do so, he will be held to have procured it by fraud.

8. In general, fraud in the obligee in obtaining a bond is a good defence against an assignee of the bond, though he be a *bona fide* purchaser of it without notice of the fraud. But it was held, that a *bona fide* assignee, without notice, of a bond and mortgage given under the circumstances and for the object before stated, might enforce them against the company.

9. Certain certificates of the director who was president, one, signed by him as an individual, stating that the bond and mortgage was executed by him as president, by order of the board, "as said amount was due the obligee as

---

Van Hook v. Somerville Manufacturing Co.

---

agent of the company," and the other, signed by him as president, stating that the board, having examined the account of the obligee against the company, did pass the same and acknowledge a balance due the obligee of \$9638.17; and a copy, signed by the secretary of the company, of what purported to be a resolution of the board, that the bond and mortgage was a legal and subsisting liability of the company, and that they had no defence to make to the same; which writings were procured by the obligee to aid him, as he said, in negotiating the bond and mortgage; were exhibited on the part of the complainant, to show good faith in taking the assignment. Before the complainant took the assignment, he was told by the president that he, the president, considered the property would be worth \$20,000 when in operation; that if he, the complainant, had the money to spare, he could not put it out more safely; that they were anxious to get the money and have the works in operation, and that if they could obtain the money on the bond and mortgage, they would be able to put the works in operation. After this, the complainant took the assignment of the bond and mortgage, and in exchange, or alleged exchange, therefor, made a deed of leasehold property in New York to a son of the obligee; and the complainant produced in evidence a certified copy of a mortgage made by the son to one — Morgan, dated August 23d, 1842. There was no evidence given to show when the assignment to the complainant was delivered, or the deed to the son—whether on the same day the mortgage was made by the son or not; but it appeared that an assignment of the bond and mortgage was left by the obligee in the office of the clerk of Somerset, on the 1st of August, 1842, and recorded after the 9th of August, 1842. No account was given of the mortgage made by the son, except that the witness of the complainant, who produced the certified copy of it, stated that he had seen it in New York the morning of the day of his examination, in the hands of one Edward P. Clark, and that "he could not get the original out of the office—they refused to let him have it." *Held*, that the complainant could not be considered a *bona fide* purchaser of the bond and mortgage for consideration paid; and *held, further*, that the information he received from the president was sufficient notice to overcome the evidence he offered of *bona fides*, if that had been sufficient to show it.

---

On the 10th of January, 1842, a bond for \$9600, and a mortgage on the real estate of the Somerville Manufacturing Company to secure the payment thereof on or before January 5th, 1845, were, or purported to have been, executed by the said company to Jared N. Stebbins, a director of the company. They are signed "John I. Gaston, president of the Somerville Manufacturing Company," with an ordinary seal annexed. The concluding clause of each runs thus—"In testimony whereof, John I. Gaston, president of said company, hath hereunto set his hand and affixed the seal of the said company, by order



---

Van Hook v. Somerville Manufacturing Co.

---

of the said company." The certificate of the officer who took the acknowledgment of the mortgage, states that said Gaston, known to him as president of the said company, appeared before him, and, he being satisfied that the said company are the grantors mentioned in the deed, and having made known to the said Gaston the contents thereof, he did acknowledge that he signed, sealed and delivered the said instrument as his voluntary act and deed for the uses and purposes therein expressed, and that he sealed the same with the seal adopted by the said company, and by the order and direction of the board of directors of the said company. This instrument was recorded in the clerk's office of the county of Somerset, on the 26th March, 1842.

Stebbins, on the 25th of July, 1842, executed a separate instrument under seal, in the presence of a subscribing witness, and acknowledged before a judge of the Common Pleas of Somerset county on the 26th of that month, assigning the said bond and mortgage to William Van Hook, the complainant. This assignment was delivered in the clerk's office of Somerset, by Stebbins, on the 1st of August, 1842, and recorded after the mortgages left in said office for record on the 8th and 9th of August, 1842; and was delivered to Mr. Blauvelt, the complainant's solicitor, on the 10th of May, 1843.

Van Hook exhibited his bill for the foreclosure of the said mortgage, and made the Somerville Manufacturing Company, and Luther Loomis and Samuel P. Lyman, who claim the property under a deed from the company, and certain judgment creditors of the company, defendants. A decree *pro confesso* has been entered against the company and the judgment creditors. The defence arises under the answer of Loomis and Lyman and the proofs in the cause.

The nature of the defence will sufficiently appear in the opinion of the Chancellor.

The testimony in the cause is as follows :

George H. Brown, for complainant.—On being shown the bond, he says he is the subscribing witness, and saw it executed by John I. Gaston, president of the company, and who was then reputed president; the seal annexed was then adopted by the board of directors for the express purpose; he is also

---

Van Hook v. Somerville Manufacturing Co.

---

subscribing witness to the mortgage; it was executed in his presence by said Gaston, president as aforesaid.

On cross-examination, he says Stebbins called on him and requested him to prepare according to law the said bond and mortgage; he suggested to Stebbins that the board must adopt a seal; on reflection, he cannot say he was present when the seal was adopted, or whether he was afterwards told that the seal had been adopted; does not know that notice was given of the time and place of meeting when the bond and mortgage were executed, or seal adopted; he has no personal knowledge of a resolution of the board to give this bond and mortgage; but at the time it was done, a resolution was produced, and the secretary, Joseph A. Gaston, was present, directing or authorizing said bond and mortgage to be given; witness supposes this was the original resolution which had passed the board for that purpose; the resolution was shown deponent, and the bond and mortgage were executed at the house of Joseph A. Gaston, secretary, in Somerville; the persons present were John I. Gaston, president; Jared N. Stebbins, a director; Joseph A. Gaston, secretary, and he thinks, William Packer, another director; the meeting was for the purpose of executing the bond and mortgage, and the said resolution was produced to satisfy witness that it was correct; the secretary kept a book of minutes.

A paper writing, purporting to be a true copy of a resolution from the minutes of the said Somerville Manufacturing Company, signed "J. A. Gaston, secretary," dated 28th June, 1842. is produced, and marked Exhibit C on the part of the complainant. The witness says it is in the handwriting of Joseph A. Gaston, secretary.

The assignment of the bond and mortgage by Stebbins to the complainant, and marked Exhibit D on the part of the complainant, is admitted by Thomson, solicitor for the defendants Loomis and Lyman.

William Packer, for the defendants.—He was a manager (i. e., director) on the 10th of January, 1842, and for the year preceding; Ibbotson and Van Renselaer lived out of the state; the company were then engaged in putting up the screw factory, foundry and blacksmith shop, and getting other machinery;

---

Van Hook v. Somerville Manufacturing Co.

---

there was a log for the shaft which had laid there six months, partly dressed, and they could not get along any further, for the want of money; at this time he had received for work he had done between \$3000 and \$4000, on the notes of Wall and Nevius, given to him by Stebbins; he never got any money from Stebbins; Stebbins, who was agent of the company, at a meeting of the board, stated that there was a debt of about \$2000 against the company, and that they could start the works if they could raise \$5000 or \$6000, besides paying the debt; through the six months prior to the 10th of January, Stebbins held out inducements to him to go on with the work, and said he could raise money by a loan on a bond and mortgage of the company; at the time he called us together, about the 1st of January, 1842, he said he could not raise the money in this way, and that he would have to give a higher interest, or pay a premium to raise the money, and then proposed a plan how he could raise the money to complete the works; this plan was to give him a valid mortgage for the amount they would want; witness objected to it, on the ground that the company owed him a great deal of money, and that he did not know that they owed Stebbins a cent; witness did not think it safe to give Stebbins a mortgage; Stebbins assured them it was the only way they could ever get the works going; through Mr. Van Renselaer, witness was induced to agree to the plan; Van Renselaer said he knew Stebbins could not raise the money the other way, *i. e.*, by a mortgage from the company to the lender, because he would have to give a premium on it, and therefore proposed that the mortgage should be given to Stebbins, in his own name, and stated that in that way the money could be obtained; this was Stebbins' plan, and advocated by Van Renselaer; this was about the 1st of January; John I. Gaston, Stebbins, and he, were the only managers present when the mortgage was given, on the 10th of January; either Stebbins or John I. Gaston called on him, and requested him to meet at Mr. Brown's office or house, in the evening, at the time the mortgage was given; witness does not know that other members of the board were notified to meet; he never had a thought but that this mortgage was given to raise money to pay the debts of the company and start the



---

Van Hook v. Somerville Manufacturing Co.

---

works ; Stebbins said the money was wanted to pay \$2000 the company owed, and to start the works ; and that it would take about \$5000 or \$6000 to complete the works ; John I. Gaston suggested that it would take more than \$2000 to pay the debts, and therefore the mortgage was made for more than \$8000 ; it was made for \$9600 ; witness was contractor for building the works, and a great deal of money was due him ; Stebbins said he wanted to pay Theodore Young some money and some at New Hope for castings ; also a debt due the State Bank at Elizabeth ; witness never knew there was any money raised on the bond and mortgage to pay the debts of the company ; he never got any of it ; not one of the debts named by Stebbins has ever been paid ; they stand just as they were ; through the inducements held out to witness by Stebbins, and letters he wrote to Gaston, he went on with the works and nearly completed them ; the inducements named by Stebbins were, that he was negotiating the mortgage, and would get the money and pay witness for his work ; he was finally compelled to suspend his work ; the foundry was still unfinished ; the millwright came with four or five hands, and worked at the mill two months ; they were induced to come by Stebbins ; they then stopped and would not work another stroke ; they told witness they were going to be deceived by Stebbins ; they got nothing but about \$80, in trade, from Mr. Steele's store ; this he understood from Mr. Young ; the castings were left at Bound Brook, and Stebbins could not get them up, as he could get no one to work for him ; and there they lay till the next October ; during the time he was negotiating in New York for the money, he said, frequently, there would be gentlemen up to see the works, and wanted us to show them as much as we could, and make things as favorable as possible ; after this he told us there must be one more thing done ; there must be some resolutions passed to suit Mr. Blauvelt ; these resolutions were passed, but whether witness was present or not, he cannot say ; he wrote to John I. Gaston that he wanted a certificate from the president of the company, to show that the company owed him the money ; at the time the mortgage was executed, witness wanted Stebbins to give him a writing to show to the other persons interested why they had acted as they did, and

---

Van Hook v. Somerville Manufacturing Co.

---

that the mortgage was given only to raise money to pay the debts and start the works, and not to pay Stebbins, for witness never knew that the company owed him anything; witness insisted on this at both of the meetings; Stebbins assured him it was not necessary; that he was the agent of the company, and that what he did would be right; he said he did not want it known that he had taken the mortgage in his own name, and if he gave a writing, he was fearful it would get out; he said he was the agent of the company, and if it got out among the people that the money was not coming to him, he would be censured, and then he would not be able to get along, but that he wished it kept still till he got the works started; witness told him that he, witness, had told Judge Nevius all they had done; Stebbins said he had done wrong, and that he was afraid witness would defeat him in getting the money; witness told General Wall, when he saw him, what they had done—that the mortgage was given to Stebbins to raise money to pay the debts and start the works; witness was present at a meeting of the water-power company, when Stebbins applied for a lease of water for the manufacturing company, and stated that he could not negotiate his loan till he got the lease; this was in June or July, 1842; at the time the mortgage was given, Stebbins had received from Wall and Nevius, \$10,500, in notes; he got out of Steele's store more than \$500, so Steele told witness; he received from Gaston between \$600 and \$700; there is still remaining, debts of the company contracted by Stebbins while he was agent, over \$7000; witness received from Stebbins, as agent of the company, about \$4100, in the notes of Wall and Nevius; Stebbins never pretended to witness, at the time the bond and mortgage were given, that there was anything due him from the company, and that there had been any settlement of any account between him and the company.

On cross-examination, he says—In January, 1842, and before, John I. Gaston was president of the company; the board of managers, at their meeting, about the 1st of January, 1842, directed that the president should give the bond and mortgage; the amount of it, he thinks, was fixed at that meeting, but he cannot say positively; the board of managers, on the day the bond and mortgage were given, adopted a seal for the com-

---

Van Hook v. Somerville Manufacturing Co.

---

pany ; he thinks Joseph A. Gaston was present at the meeting when the bond and mortgage were given ; he thinks it was about April Court, or at a time that Stebbins stated to him that Mr. Blauvelt was at Somerville to examine the records, that Stebbins wished to get the resolutions passed by the board ; he does not know that Blauvelt was ever up to examine the records, but only what Stebbins told him ; the resolutions required by Stebbins were passed by the board ; Joseph A. Gaston was secretary of the board ; thinks it was within two weeks after the bond and mortgage were executed, that he told Judge Nevius it was done, and stated to him why it was done ; thinks it was in the June following, that he told General Wall the bond and mortgage had been given ; General Wall said very little about it ; Judge Nevius was a good deal dissatisfied ; General Wall said they had got enough, already, in the hands of Stebbins ; Wall and Nevius were then large stockholders, and had paid in, between them, between \$10,000 and \$11,000 on their stock ; no effort was made, to his knowledge, by any one of the company, to recover back the bond and mortgage from Stebbins ; we never had an official meeting of the board after the bond and mortgage were given, till after we found he had used them ; he had used them a long time before any of us knew about it ; I only knew the debts of the company from acknowledgments and statements made at the meetings of the board, and by the statements of the managers and the president.

On re-examination.—After they had found out that Stebbins had assigned the bond and mortgage to Van Hook, he, Stebbins, denied to witness and John I. Gaston that he had ever made use of the bond and mortgage, and said he could make no use of them till he could get a lease from the water-power company ; witness does not know that Wall or Nevius was ever informed that Stebbins intended to use, or had used the bond and mortgage for any other purpose than what it was intended for ; witness was present at a meeting when Stebbins applied for a lease of water, when Stebbins blamed General Wall for his not getting the lease ; Stebbins said he could not raise the money on the bond and mortgage without the lease ; General Wall then said he could not have the lease, and that he must



---

Van Hook v. Somerville Manufacturing Co.

---

return the bond and mortgage; the company frequently told Stebbins that he was largely indebted to them, and if he had any claims he must present them; and he would say he was ready for a settlement; that his books were in New York; and when in New York, he would say they were in Somerville; and we never could nor did get a settlement while Stebbins was in the board.

John I. Gaston, for the defendants.—He was president of the company; what Packer has testified as to the situation of the buildings and the property generally, is correct; the first he knew of the bond and mortgage, was on the evening the company resolved to give them; there had been some talk about giving them some time before, for the purpose of raising money for the company; then he found they had all agreed on giving the bond and mortgage; he was opposed to it himself; he did not wish to encumber the property without giving the stockholders notice; Stebbins then said that all we had done would be lost unless we raised money on bond and mortgage; and that there were many debts that were pressing and must be paid; he then produced a memorandum showing that the company owed him about \$10,000 for services, house rent, &c., and considerable interest on it; and, therefore, there would be no danger in giving him the bond and mortgage; the reason he gave why a bond and mortgage should be given to him was, that he could not negotiate a bond and mortgage to the lender; he said he would be compelled to give a premium on it; but if it was given to him, he could assign it to some one and give some further security and make it an individual transaction of his own; he said it would enable him to pay the pressing debts of the company and complete the works; that was the purpose, entirely, for which the bond and mortgage were given; and not to pay any debt the company owed him; I did not, in giving the bond and mortgage, recognize that the company owed Stebbins anything; yet at the same time, if he had not made some show that the company owed him, witness would not have consented to give the bond and mortgage; as it ultimately turned out, I believe, the company did not owe him one dollar; in the statement exhibited by Stebbins, he thinks there was no credit given; the account was nearly all for salary; he

---

Van Hook v. Somerville Manufacturing Co.

---

knows there was no credit given for the notes received from General Wall or Judge Nevius; there never was a settlement with Stebbins and the company; and we could never get a statement of what he had received; he thinks Stebbins had received, in notes of Wall and Nevius, \$10,000; the indebtedness of the company at the time the bond and mortgage were given was about \$6000; he does not know what Stebbins had paid out; the whole of the expenditures at that time ought not to have exceeded \$6000; at the time the bond and mortgage were given, Stebbins said the object of the mortgage was to raise money to pay the pressing debts and complete the works; there never was one dollar raised on the bond and mortgage that came into the hands of the company; and I did not, until within a year past, know that it had been assigned away by Stebbins; the letters shown him, and marked Exhibits A and B, are in the handwriting of Stebbins, and were received by witness from Stebbins, during the time he pretended he was negotiating the loan; the \$1500 mentioned in the letter of January 17th, 1842, is a prior debt against the company, as security for liabilities incurred for the company; Mr. Packer, whose name is mentioned in the letter marked B, is the William Packer who was contractor on the works; Stebbins said he must raise the money to complete the works, for that he had \$30,000, all he had in the world, in the company; and he would be ruined unless he got the works completed; the property mortgaged, being in an unfinished state, and without the use of the water, and if subject to the mortgage of \$9600, was not worth anything to the stockholders; neither would it pay the mortgage; Stebbins brought Van Hook out to look at the property some time during the spring or summer of 1842; Van Hook stopped at witness' door, and told witness he had come out to see about loaning Stebbins the money on the bond and mortgage; I told him we wanted about \$10,000 to set the property going and pay the debts, and that Stebbins said that sum would do it; that I considered the property would be worth \$20,000 when in operation; I told him the amount of expenses we had been at, about \$180,000; that if he had the money to spare, he could not put it out more safely; that we were anxious to get the money and have the works in operation; Van

---

Van Hook v. Somerville Manufacturing Co.

---

Hook said he could furnish the money if he was satisfied with the security, but that he did not wish to run any risk, as he had already lost some money on loans made for other persons ; he made several inquiries respecting the value of the property ; that is all that passed between us that I know ; I never made the least intimation to Van Hook, or any other person, that the money was to be raised for the benefit of Stebbins, but always supposed it was for the benefit of the company ; Van Hook did not inquire as to the means of the company for completing the works, but I told him that if we could obtain the money on the bond and mortgage, we would be able to put the works in operation, and that then the property would be valuable ; my impression is, that the resolutions offered in evidence were passed before the conversation took place with Van Hook, but am not positive ; by the information witness received from Stebbins, there was no negotiation of the bond and mortgage at the time the resolutions were passed ; I gave Stebbins such a certificate as he asked for to enable him to effect a loan ; it was given him for the same purpose the bond and mortgage were given for—to enable Stebbins to make the loan ; I gave the certificate to aid him in making the loan, and that the bond and mortgage were valid ; I never gave Stebbins a certificate that the company had given him the bond and mortgage for any debt due him from the company.

Cross-examined.—He does not recollect whether he was present at the meeting of the board when the resolutions were passed, but he recollects something about the resolutions, and probably he was present at the time they were passed ; he presumes the original minutes are in the hands of the company in New York ; Ibbotson got them of his son, and took them to New York ; he did not convey the idea to Van Hook, or any other person, that the bond and mortgage were given to Stebbins for a debt due from the company to Stebbins ; Van Hook made no inquiry about its being for a debt due Stebbins ; there was no conversation on that subject.

In chief.—The resolutions were to aid Stebbins in the negotiation in raising the money on the bond and mortgage for the use of the company ; he applied to witness for the resolutions, and said he wanted them to assist him in get-



---

Van Hook v. Somerville Manufacturing Co.

---

ting the money on the bond and mortgage, and they were passed for that purpose, and if any certificate was given by me as president of the company, it was given for the same purpose; he does not know that Stebbins ever paid any money out of his own funds for the use of the company; the company have never expended anything at Somerville, except for building and some castings; the expenditure he before alluded to is \$180,000 in stock; the scrip to be delivered for the Poughkeepsie machinery and patents, depending on them to fulfill.

Cross examined.—Witness is not a stockholder, and has no interest in this suit; Stebbins was employed by the Somerville Manufacturing Company as their agent, at \$3000 a year salary and a house; thinks it was three years from the time he was engaged as agent till he was dismissed; but he does not know that he was engaged in the business of the company more than a third of the time; the first year he does not think there was much done; there never was any agreement between the company and Stebbins varying the first bargain made; there never was a settlement by the company with Stebbins; they never could get him to a settlement, or to make a statement; there never was a formal account rendered by him to the company as agent; at the time the bond and mortgage were given, Stebbins presented a statement on a small piece of paper, showing that the company was indebted to him between \$9000 and \$10,000 for services; there was a minute made in the books of the company of the bargain of the company with Stebbins; Van Renselaer was present when the statement was produced by Stebbins, and it was talked about, but he does not recollect that Van Renselaer said anything about it; witness did not take the statement as a settlement, but merely to show that the company were in no danger in giving him the bond and mortgage; he does not know that Van Renselaer recognized the statement as a just claim of Stebbins against the company.

In chief.—At a meeting of the company in New York, the company told Stebbins they were unwilling to pay him \$3000 a year, because he had not been engaged in the business of the company the whole time; Stebbins said he had been engaged a considerable part of the time for the water company, and he

---

Van Hook v. Somerville Manufacturing Co.

---

was willing that whatever that company paid him, might come out of his wages; the company never admitted that they owed Stebbins anything; but we did not know whether we owed him, or he owed us; at the time the bond and mortgage were given, it was proposed by Stebbins, and agreed to by the company, that it should be given to him to raise money to pay the debts of the company, and to enable them to complete the works, and for no other purpose, and not for any debt due him from the company, or pretended to be due.

James Taylor, for defendants.—The assignment of the bond and mortgage was acknowledged before him; he does not know who brought it to him; he has never seen Van Hook, to his knowledge; Stebbins appeared before him and made the acknowledgment; thinks he heard Stebbins say that the object of giving the bond and mortgage was to raise money for the company to complete the works; that is his impression, but he is not certain of it.

Edward F. Loomis, for the defendants.—He served a subpoena on Henry L. Stebbins to appear at this place this day; served it last evening, about half-past four o'clock, and paid him one dollar; when witness handed him the subpoena he said, what is this? he read it, and said he did not know what it was; he said he did not know anything about it—that he did not know Mr. Van Hook; Henry L. Stebbins is the reputed son of Jared N. Stebbins.

Allan Clark, for the defendants.—I now reside in Somerville; in 1842 I resided in New York; the paper marked Exhibit C on the part of the defendants, is in my handwriting; I saw it executed by all the parties except Mr. Gaston; it was executed by Stebbins on the 11th of September, 1842, and was finally executed by all the parties on the 1st of October, 1842; it was to take effect as soon as a majority had signed it; the paper marked Exhibit D is in my handwriting, and was executed on the 2d of September, 1842; it was modified in part on the 11th of September, 1842, and referred to in the agreement signed that day; the paper marked Exhibit E is in my handwriting, and was executed in part on the 11th of September, 1842; it was signed by Van Renselaer, Loomis, and Lyman, and Jared N. Stebbins on that day; it was

---

Van Hook v. Somerville Manufacturing Co.

---

afterwards signed by General Wall, not in my presence, but I know his signature; and also by Lyman for Judge Nevius; I saw the authority in the handwriting of Judge Nevius to Mr. Lyman for him to sign his name to that writing; the date of this writing was altered from September 11th to October 3d, at the request of Stebbins; he stated that it was for the purpose of securing a small debt of the manufacturing company to Mr. Steele, of about \$500; that he had promised Steele there should be no prior lien to his; he said the property was clear of all encumbrances; I have heard him represent this more than once; the first I heard of the negotiations which resulted in the above agreement, was a conversation between Stebbins and Lyman; Stebbins represented all the debts of the company not to exceed \$3000; he never claimed any debt that the company owed him; I have seen him make a list of the debts; he always represented that the company were unable to go on any further, for the want of money, and that was the reason he applied to Mr. Lyman to make the negotiation; I was present when the agreement was signed by some of the parties; I knew the property which Stebbins said he had bought of Van Hook; I had a conversation with Stebbins in April last, about this property; I have known the property for ten or fifteen years; it is leasehold property, and the term has about ten years to run; at the time Stebbins got this property it was worth about \$4000; Stebbins has always claimed this property as his own.

Cross-examined.—There are buildings on this property, of brick, about twelve and a half feet front, and three stories high; I think there are five separate entrances to the building in front; I do not know what is the rent of the property; I lived in the neighborhood of the property sixteen or eighteen years; I now own property in the same neighborhood; I am now in the employ of Lyman & Loomis, who are partners in business.

William Thomson, for the defendants.—I saw the paper marked Exhibit E, executed by John I. Gaston.

A deed from the Somerville Manufacturing Company to Loomis & Lyman, dated October 18th, 1842, was exhibited on the part of the defendants.

The master states that it was admitted by the parties that



---

Van Hook v. Somerville Manufacturing Co.

---

the assignment of the bond and mortgage by Jared N. Stebbins to the complainant, was delivered in the clerk's office of Somerset county, on the 1st of August, 1842, by said Stebbins, and recorded after the mortgages left in the office for record, on the 8th and 9th of August, 1842, and delivered to Mr. Blauvelt, the complainant's solicitor, on the 18th of May, 1843; and that it was agreed by the parties that the paper marked Exhibit C on the part of the complainant, is a true copy of the resolutions passed by the board of managers of the Somerville Manufacturing Company, duly certified by the secretary.

John M. Mann, for the complainant.—He is acquainted with Loomis and Lyman, two of the defendants; is acquainted with the property of the Somerville Manufacturing Company contained in the mortgage in controversy; some time prior to June 25th, 1842—the precise time he cannot say—he was employed, on behalf of Mr. Van Hook, to examine into the title of the property belonging to the Somerville Manufacturing Company, at Somerville, included in said mortgage, with the understanding that there was a negotiation going on between Van Hook and Jared N. Stebbins; he made the examination, and gave a certificate to that effect; he examined the book of minutes of the company, as it was represented to him; he did not know it to be the book of minutes of the company, any more than that it contained the proceedings of the company; he does not know where he found it; he found on this book a resolution of the board of directors of the company, of an indebtedness of the company to Jared N. Stebbins of \$9638; there was also in said book a resolution authorizing the president of the company to execute a bond and mortgage to Jared N. Stebbins for \$9600, on the real estate of the company; all the information he gathered in relation to this property he gave either to Van Hook, or to his counsel, Mr. Blauvelt; he had no knowledge of the bond and mortgage given to Stebbins, or anything in relation to it, except what he got from the resolution on the book of minutes of the company; he knows the handwriting of John I. Gaston. [Being shown a paper writing marked Exhibit A on the part of the complainant, he says]—The name John I. Gaston, subscribed to said paper, is said Gaston's handwriting.

---

Van Hook v. Somerville Manufacturing Co.

---

Cross-examined.—He thinks the property of the Somerville Manufacturing Company would be worth very little without the water-power.

Abner Jones, for the complainant.—He resides in New York, and has resided there thirteen or fourteen years ; he has been a real estate broker for the last five years, and is now. [Being shown the bond and mortgage in controversy, he says]—He has seen them before ; the first time he saw them was in the spring of 1842 ; the occasion on which he first saw them was about the time of the completion of the arrangements between Stebbins and Van Hook ; he had been applied to prior to that time, by Stebbins, to negotiate the bond and mortgage for him ; about the last of March or first of April, 1842, he was applied to by Stebbins to negotiate the bond and mortgage ; witness offered it for dry goods, and offered it to other persons before he offered it to Van Hook ; about the time last mentioned, he offered the said bond and mortgage to Van Hook for some houses he had in the Third avenue, New York ; while it was under consideration, he obtained from Van Hook another offer, which Van Hook preferred, being some cash and New York securities ; in the fore part of May witness went and showed Jared N. Stebbins the property contained in Exhibit I, J. M. Mann, master, which resulted in the purchase of the bond and mortgage by Van Hook ; Stebbins was to make up the mortgage to \$10,000, and make it equal to a ten per cent. mortgage ; Van Hook was to give him for it, the five houses and lots contained in said Exhibit I, and the leases, and give him also the benefit of the decree, if the property should not bring as much as the mortgage Van Hook held on the property ; the rent which had been kept back for six or nine months in the hands of a receiver, was to go to Stebbins ; Van Hook at this time held a bond and mortgage on the said property, witness thinks, of \$10,000, which was in an advanced state of foreclosure, or had been foreclosed, he does not know which ; the sale of the property had not then been made ; it was to be sold, and after the sale Stebbins was to get his title through Van Hook ; this trade had been agreed upon some weeks before the sale by the master ; the sale was partly given up once by Van Hook ; Stebbins desired the property to be purchased in as low as it

---

Van Hook v. Somerville Manufacturing Co.

---

could be; witness took a message from Stebbins to Van Hook, for him, Van Hook, to buy in the property at a small price; the reason why Stebbins wished the property bought in at a small sum was, that the smaller the sum for which it sold, the larger would be the amount left due on the decree, which he, Stebbins, would be enabled to enforce against Bowen, the defendant in said decree; which balance belonged to Stebbins by the terms of the bargain; this whole transaction took place in the city of New York; witness was first applied to by Stebbins; Van Hook never applied to witness; Van Hook paid one-half of the commissions, in consequence of some misunderstanding between Stebbins and Van Hook as to the terms of the bargain; this was done by way of settling the difficulty; witness looked to Stebbins for his commissions; did not think of charging Van Hook, until Stebbins and he agreed that he, Van Hook, should pay one-half; Van Hook refused to part with the five houses and lots for less than the amount of his mortgage, as they were worth that to him; witness and Stebbins went together to see the property, and went through two or three of the houses; this was before the bargain was made; at this time Stebbins was willing, and proposed to witness to give his bond and mortgage for the said property and decree; previous to the bargain being closed, Stebbins went to see the property once or twice, as he informed witness, and showed him a memorandum of the income; after paying ground rent and all expenses, the property rented for enough to make it a seven per cent. matter on \$10,000, as it strikes witness; he does not speak positively; Stebbins examined about the rents particularly, to know what would be in the hands of the receiver; Van Hook repeatedly said, in the course of the negotiation, that he would not take less than the amount due on his mortgage; witness says if he had owned the property when the bargain was made in May, 1842, he would not have taken less than \$10,000 for it; since this property has been sold by Van Hook, it has been mortgaged for \$8000; witness has seen the mortgage; saw it this morning in the hands of Edward P. Clark; never saw the mortgage in any other place than in the city of New York. [Being shown a paper marked Exhibit B on the part of the complainant, he says]—It is a



---

Van Hook v. Somerville Manufacturing Co.

---

true copy from the original, which he could not get out of the office; they refused to let him have it; witness has sold and negotiated for the sale of a large amount of real estate in all parts of the city of New York; during the last five or six years he has been a real estate broker in the city of New York; he has some knowledge of the value of real estate in the city; during the time of this negotiation, and about the close of it, he learned from Van Hook and Stebbins that they had been over to Jersey, at Somerville, to look at the property on which the mortgage in controversy is; they said they had seen Gaston, the president of the company; Van Hook did not see the property; had not time; from the time the first trade of the Third avenue property was talked about, Van Hook and Stebbins talked of going over to Somerville, and whether they did go before the last trade was introduced or shortly after, witness is not able to say with certainty, but feels confident it was before the 20th of May, 1842.

Cross-examined.—The property in the deed contained in Exhibit I, was sold at public sale; Henry L. Stebbins had nothing to do with the negotiation with Van Hook; about the close of the negotiation, Stebbins said the property was to be made to his son, Henry L. Stebbins.

John S. Blauvelt, for the complainant.—In the spring of 1842, he was in the complainant's office in the city of New York; he cannot specify the exact time, but thinks it was the last of April or early in May; Van Hook stated to witness that Stebbins had offered him a mortgage upon the property of either the Water Power Company or the Somerville Manufacturing Company, and wanted witness to examine the title and ascertain the value of the property; witness told him he had better get John M. Mann to do it, as he lived some distance from Somerville; that Mann had been clerk of the county, knew the property, and probably knew the title, and he could get more satisfactory information from him than he, witness, could give him; Van Hook thought that would be the best way; as the conversation closed, he remarked to Van Hook that the bond and mortgage being made by a corporation, he had best ascertain, before he took it, if it had been properly executed, and he had better also get a recognition of the bond and mortgage

---

Van Hook v. Somerville Manufacturing Co.

---

by the company as a good and valid bond and mortgage, and that the company had no defence to make against the bond and mortgage, either in law or equity, or something to that effect; witness does not recollect that he held any communication with Van Hook on the subject, afterwards, until after the bond and mortgage had been assigned to him, nor had witness anything to do with the examination of the title or value, or with the negotiation, having referred him to Mr. Mann, as his counsel, to get the information; witness was at Somerset Court—which is held on the third Tuesday in June in each year—at the term of June, 1842, on the first day; saw Stebbins there; he inquired of witness what kind of a resolution of the company Van Hook wanted in relation to the bond and mortgage, so that he, Van Hook, would take it; witness referred him to Mr. Mann; Stebbins applied again, and maybe more than once, and finally witness told him what kind of a resolution he supposed Van Hook wished; witness may have drawn or dictated a resolution on the subject, but his memory does not entirely serve him; he had some conversation, he thinks, but is not certain, with Mr. Mann on the subject of the bond and mortgage; witness did not then know anything about the bond and mortgage, or the circumstances under which it was given, nor did he hear anything of any difficulty about the said bond and mortgage until several months afterwards—thinks about the middle of the following winter; when witness was at Somerville, in June Term, 1842, as above stated, he knew the fact that Van Hook had been to Somerville to see and inquire about the mortgaged property; that he had seen Gaston, the president of the company, and that he had not seen the property, for he told witness so; when or where, witness does not recollect; it is possible witness may have seen him at Perth Amboy, in the latter part of May, in that year; he does not recollect to have had any communication with Van Hook about the bond and mortgage, after that above stated as having taken place in his office, for some months afterwards.

Dudley Selden, for the complainant.—He resides in the city of New York, and has resided there more than twenty years, and is a lawyer; he says he is acquainted with the New York property described in Exhibit I, and has known it since 1836

---

Van Hook v. Somerville Manufacturing Co.

---

or 1837, particularly ; there were three adjoining lots, of which the premises in said exhibit is five-sixths, each lot being 25 feet front, by a little over 100 feet deep ; they were vacant, and held under leases from Mr. Rogers ; the agent of the owner of the leases applied to witness to purchase them ; witness purchased his interest in the three lots under said leases, at the rate of \$1000 per lot ; the fee simple of the lots, at that time, was worth from \$3000 to \$3500 each, free from all encumbrance ; after having purchased these three lots, witness determined to build upon them six houses, of twelve and a half feet front, and made an arrangement with the builder, whereby he, in connection with Mr. J. Rogers, should build two of the houses on his own account, substantially corresponding, externally, with the four witness was to build on his own account, witness advancing some portion of the money, which was to be secured by a mortgage on their respective buildings ; under the arrangements, six buildings were put up, occupying the entire front of the three lots ; the cost of the four buildings put up on the two lots retained by him, was over \$8000 ; he thinks the contract price was either \$2000 apiece, together with certain additions not covered by the contract, or it was \$2200 apiece, with certain additions ; he took a mortgage from Colburn and from Rogers, for advances he made to them in building their houses ; the amount of the mortgages he does not recollect ; they were probably about two-thirds of the cost of the lot and buildings, perhaps a little more ; the titles to Colburn and Rogers' lots were made to them, either by his surrendering the lease to them and they taking out new leases, or by his assigning to them the lease for one of the lots which he held ; the said Rogers who became interested in the one-half of this one lot, is wholly unconnected with the Rogers who is the original lessor of the three lots ; the one who claimed under witness was Rogers the architect ; about a year after witness got the building completed, property began to depreciate in New York, and gradually declined for about three years ; the buildings, he thinks, were completed in 1837 or 1838 ; thinks real estate in New York continued depreciated until the beginning of 1842 ; he thinks he rented his houses for from \$350 to \$375, each house ; thinks he got, the first year for some of these houses



---

Van Hook v. Somerville Manufacturing Co.

---

\$400 ; shortly after the buildings were completed he made an arrangement with a Mr. Bowen, then in Europe, and who at that time had certain funds in the hands of witness, whereby the purchasing the lots, the building, the arrangement made with Colburn and Rodgers, the letting of the houses, &c., were all deemed to have been made by the said Bowen ; his impression is, he originally intended the said property for Bowen, and wrote to him on the subject ; witness foreclosed the Colburn mortgage for non-payment, and became the purchaser under the foreclosure, for the benefit of Bowen ; Colburn had become embarrassed, and left the city ; this was about a year or eighteen months after the buildings were completed ; the Colburn house and the four houses built by witness are included in Exhibit I ; before witness transferred the leases under direction of Bowen, witness, at his request, executed a mortgage upon the premises, collateral to Mr. Bowen's bond, which witness believes was to Mr. Van Hook ; witness thinks it was conditioned for \$10,000. [Being asked what was the value of the premises in 1840, he says]—He should think that, in May, 1840, such buildings as were put up on these premises could have been constructed for \$1750 apiece ; and had the leases for the vacant lots been offered to witness at that time, he would not have been willing to have given more than \$500 for the leasehold interest in each lot of twenty-five feet front ; he thinks the entire property would have sold for more in 1842 than in 1840 ; he received the rents for several years after the buildings were put up, and up to about the time of the sale under the foreclosure of the mortgage that was given to Van Hook, acting therein as the agent of Bowen ; the rents of the buildings fell off considerably, and varied from \$225 to \$275 or \$300 for each of the five houses ; there were more houses in New York during the depression of business than there were tenants who usually occupied such houses, to occupy them ; some of these houses were occupied by two tenants ; the rents, during the depression, were not always collected in full ; perhaps, if witness pressed hard, he might have got them.

William Packer, for the defendants.—I was present at the time a certain resolution of the board of directors of the company was passed, dismissing Stebbins from their employ, and

---

Van Hook v. Somerville Manufacturing Co.

---

speaking of the mortgage in this suit, which resolution was passed in the middle of October, 1842; which resolution I saw last Monday night, and to which I will put my name when requested; the resolution is in the handwriting of John I. Gaston, who was president of the board, and was certified by him; Ibbotson, Gaston and myself, and, I think, Van Renselaer, were present at the meeting when the resolution was passed; Stebbins was not present, but had notice.

Cross-examined.—I am well acquainted with the handwriting of John I. Gaston; the paper marked Exhibit No. 1 on the part of the complainant, now shown to me, is in his handwriting.

It was agreed by the solicitors of the parties, that the book of minutes of the board of directors be used as evidence on the hearing of the cause; and that if it be furnished for that purpose, it is to be used for that purpose and no other, and is to be returned to the person furnishing it, after being used for the purposes of this cause.

Robert Van Renselaer, for the complainant.—He was a director of the company in 1841 and 1842; Jared N. Stebbins was also a director, and managing agent of the company, at a salary of \$3000 a year; deponent was present at a meeting of the board when the account marked A on the part of the complainant, was presented and passed upon by the board; the signature to said account is that of John I. Gaston, president of the board; at a meeting of said board he has no recollection that an order was made directing a mortgage to be given to Stebbins, but knows that a mortgage was given, sanctioned by the board, but whether at that meeting or not deponent does not know; he remembers being present at a meeting of the directors when a discussion took place as to the time when the mortgage should become payable, Stebbins wishing it to be at a short date, and the directors at a longer one; the time was fixed upon, but deponent does not remember what that time was.

Cross-examined.—At the time said mortgage was proposed to be given, the company was struggling with pecuniary difficulties which seemed to be insurmountable; the works of the company were suspended at that time for the want of funds; the

---

Van Hook v. Somerville Manufacturing Co.

---

manufacturing company had just commenced its operations; deponent is not aware of any settlement having been made between Stebbins and the company, excepting so far as refers to the account marked A; Stebbins received a large amount of notes and obligations and moneys for account of the company; he knows that Stebbins received \$4000 from the water-power company, to be applied to the use of the manufacturing company, as appears by the settlement of the water-power company at Bunker's; the question was often discussed by the company as to the mode of raising money, and as to whether any money could be raised by a loan on the company; Gaston was of opinion that any amount could be raised; deponent was of opinion it could not; the company was indebted, at the time, to several persons, who were pressing for their debts; when the mortgage was given to Stebbins, he gave the assurance that he could raise a sufficient sum to relieve the company from its embarrassments, and go on with the works and complete the manufacturing establishment; deponent consented to the mortgage, to secure the indebtedness of the company to Stebbins, but would not have consented, had it not been for the assurance of Stebbins that the proceeds would have been applied for the payment of the debts and prosecution of the works of the company; he was present when the negotiation was going on between the company and Loomis and Lyman, for the property covered by the mortgage, but cannot remember the month; Stebbins always represented to deponent that the mortgage was under his control; deponent never knew that Stebbins' property in the mortgage had been absolutely transferred, until the present summer; deponent derived that impression from the assurances of Stebbins, that he had the control of the mortgage; deponent knows nothing of the resolutions of the board or certificates of the president, in relation to the mortgage, at the time of the transfer to Van Hook, or of the machinery by which said resolutions and certificates were obtained, which resulted in the negotiation of the mortgage; deponent not having been present at any of the meetings of the board when the resolutions were passed and the certificates given.

In chief.—A prior mortgage was given to the State Bank at Elizabeth, to secure to them the indebtedness of the individual



---

 Van Hook v. Somerville Manufacturing Co.
 

---

directors; and deponent only consented to the Stebbins mortgage on condition that said mortgage should be given to said bank to claim priority to the Stebbins mortgage.

The following is the writing before referred to, marked Exhibit C on the part of the complainant:

At a meeting held June 28th, 1842, the following preamble and resolution were passed:

"Whereas a certain bond and mortgage given by the Somerville Manufacturing Company to Jared N. Stebbins, for the sum of \$9600, bearing date the tenth day of January, 1842, has been this day submitted to the inspection of this board, and the same having been considered and examined, it is

*Resolved*, That the said bond and mortgage is a legal and subsisting liability of the said company, and that they have no defence to make to the same, either in law or equity.

"June 28th, 1842."

I certify the above resolution to be a true copy from the minutes of said company. J. A. GASTON, *Secretary*.

Exhibit A, L. D. Hardenburgh, master, on the part of the complainant, is as follows:

<i>Somerville Manufacturing Company,</i>			
To J. N. STEBBINS,		DR.	
1840. Feb. 1.	To am't balance due, per voucher.....	\$4517	93
1841. " 1.	" interest one year.....	271	75
	Rent from 1st Feb. to 1st May, 1840..	87	50
	Half month rent to 15th June.....	43	74
	Rent to 1st April, from 15th June.....	200	00
1841. Feb. 1.	One year's salary.....	3000	00
	Interest one year.....	487	25
		<hr/>	
		\$8608	17
1840. By note of Gen. Wall and Judge Nevius, \$1000			
	Three notes, \$500, \$278, \$222.....	1000	
	Interest one year.....	120	2120 00
		<hr/>	
		\$6488	17
DR. To one year's salary.....		3000	00
		<hr/>	
		\$9488	17
1841. Jan. 1. Rent.....		150	00
		<hr/>	
		\$9638	17

---

Van Hook v. Somerville Manufacturing Co.

---

The board of directors having examined the above account, do pass the same, and acknowledge a balance due J. N. Stebbins of \$9628.17:

Signed by order of the board,

J. I. GASTON, President.

A paper marked B., L. D. Hardenbergh, master, on the part of the complainant, is exhibited as a copy of a mortgage mentioned in the testimony of Abner Jones, as given by Henry L. Stebbins to John B. Morgan, dated August 23d, 1842, for \$8000, on the leasehold property in New York.

Exhibit I, G. A. Vroom, master, on the part of complainant, is as follows :

I do hereby certify, that a bond and mortgage for \$9600, was given and executed by me to Jared N. Stebbins, as president of the Somerville Manufacturing Company, by order of the board of directors, as said amount was due said Stebbins, as agent of the company, and I know of nothing that could be brought against said claim in abatement or in any way destroy its validity.

JNO. I. GASTON, President.

June 28th, 1842.

Exhibit A on the part of the defendants, is a letter from J. N. Stebbins to J. I. Gaston, dated January 17th, 1842, as follows :

Dear Sir : I returned from New York Saturday evening, expecting to have gone back in the nine o'clock train this morning ; but an attack of a violent pain in my head, with sickness at the stomach, has prevented. Should I be able, I intend to go in the morning. I fear I shall not be able to negotiate my mortgage until after the next meeting of the water company board, which will probably be on the 1st of February. I have found a person who has \$10,000 to loan, at seven per cent., and will let me have it on the mortgage, provided the property on which it is a lien is worth \$20,000 ; but he objects until I get some certainty for water without any question ; he does not like any chance for a law-suit. It must be a first mortgage. This can be got along with, either by paying up the \$1500, or keeping it back, as we shall hereafter agree upon.

---

Van Hook v. Somerville Manufacturing Co.

---

Now it is not possible for me to get along without money, and I am trying to negotiate some of my stock to raise the wind. I have sent up to your son one of my certificates of fifty-six shares, and he has sent me the three scrips here inclosed, for your signature; this makes thirty-eight shares, including the fifteen I had before, and there is now eighteen more due me upon the fifty-six, when I come to settle. I would thank you to add your signature to the three scrips, and send them to me. I should like to see you before I go to New York, if you are coming down town.

Respectfully and truly yours,

Monday, January 17th, 1842.

J. N. STEBBINS.

P. S. I cannot pay the five dollars till I return. I heard of your being in town, and sent for you this morning, but could not find you.

Exhibit B on the part of the defendants, is a letter from J. N. Stebbins to John I. Gaston, dated New York, March 29th, 1842, as follows:

Dear Sir: I find obstacles in the way of negotiations. I want a certificate from you as president, that the bond and mortgage is a valid one, given me for the amount due me. The best way is, to copy the resolution on the books, provided there is nothing else in said resolution. I also want a certificate from the clerk that the title is good and free from encumbrance. Now you know perfectly what I need; will you get it for me and forward it to the care of C. Wykoff, Merchants' Hotel?

I want the wall put up and the shingles put on the foundry, and I have written Mr. Packer to do it now. I wish you would try to aid him in getting it done, and I will pay for the shingles, &c., just as soon as I get the money upon the mortgage, which I can do as soon as I can satisfy that all is right, and the property worth double the money; and I think they will send some person over to look, and I want it all right when they get there.

Yours, truly,

J. N. STEBBINS.

New York, March 29th, 1845.

Exhibit C on the part of the defendants, is an article of agreement between J. N. Stebbins, Robert Van Renselaer, Wil-



---

Van Hook v. Somerville Manufacturing Co.

---

liam Packer and John I. Gaston, managers and directors of the company, and Luther Loomis and Samuel P. Lyman, witnessing, that the parties of the first part, in consideration of \$3000, the receipt whereof is acknowledged in behalf of the said company, have sold, assigned, transferred and delivered, and do thereby sell, &c., all and singular the letters patent, &c.; more particularly described in a deed to the Somerville Manufacturing Company, a copy whereof is hereunto annexed. And do, for the like consideration, sell, assign, transfer and deliver to the said parties of the second part, all the right, title and interest of the said company, and of the parties of the first part, of the property and effects of the said company, described in said deed, consisting of machinery for the manufacture of screws, stock of materials, tools, chattels and effects, of whatever name or nature, belonging to the said company, free and clear from all encumbrance. This article is signed and sealed by Van Renselaer, Stebbins, Packer and J. I. Gaston.

Exhibit E on the part of the defendants is a memorandum of an agreement, dated October 3d, 1842, signed by Loomis and Lyman, Van Renselaer, J. N. Stebbins, Wall and Nevius, reciting that the affairs of the company had long been so embarrassed that the property of the company could not be made productive, and must be sold to meet the liabilities of the company, and that the parties to the memorandum are holders of a large amount of the stock of the company, and had already expended large sums to make the property productive, and that it had become necessary that further sums be expended to save what had been laid out from total loss, and that it was the intention of the parties to the memorandum, to afford an opportunity to other parties who claim to have an equitable interest in the property, to make advances, *pro rata*, which shall be equal to the expenditures made by the parties named in the memorandum, and share with them in the benefits or disadvantages to accrue from what has been undertaken by the said parties; and providing, 1st, That at any sale of the property and effects of the company which may take place under any execution or decree, or at private sale by the managers of the company, the property shall be bought by Loomis and Lyman,

---

Van Hook v. Somerville Manufacturing Co.

---

for the parties who shall subscribe the memorandum, at the lowest price at which it is possible to purchase the same; provided the price of the whole shall not exceed the sum which Loomis and Lyman may be willing to pay for the same; which property, when purchased, shall be held by them for the benefit of the said Loomis and Lyman, G. D. Wall, J. S. Nevius, Henry Ibbotson, Jared N. Stebbins and Robert Van Renselaer, in case they become parties to the memorandum, in the following proportions: Loomis and Lyman shall have six-twelfths, and Wall, Nevius, Ibbotson, Stebbins and Van Renselaer six-twelfths; and each one shall pay, *pro rata*, for the purchase of the said property, according to his interest in the same, to be thereafter declared.

2d. Immediately after the execution of the memorandum, an accurate inventory and valuation of all the effects of the company shall be made.

3d. As soon as the property and effects of the company can be obtained, and title thereto perfected, for the benefit of the parties named therein, a lease for all the water-power required for the use of the said purchasers, is to be obtained from the Somerville Water Power Company, upon the usual terms, at the rate of \$4 per annum for each square inch.

4th. The title to the said property under the sale herein contemplated, shall be acquired as soon as the same can be done, consistent with the interests of the said parties, and without doing violence to the rights of others.

5th. Simultaneously with the steps herein agreed to be taken, it is understood that steps shall be taken to clean up and put in order all the machinery and effects of the company, and to prepare the same for use as soon as the circumstances will permit.

6th. It is the understanding of the parties, that as soon as the said purchases are made and the value of the same ascertained, articles of agreement more full and defining the rights of the parties more particularly, are to be made and entered into between the parties; but until then this memorandum is to be binding.

(Signed,)

LOOMIS & LYMAN,

ROBT. VAN RENSELAER,

JAMES S. NEVIUS, by S. P. Lyman for him.

J. N. STEBBINS,

GARRET D. WALL,

---

Van Hook v. Somerville Manufacturing Co.

---

Exhibit K on the part of the defendants, is a deed, dated October 18th, 1842, from the company to Luther Loomis and Samuel P. Lyman, therein stated to have been made by virtue of a resolution of the board, conveying, for \$3000, therein acknowledged to have been received, the real estate of the company, (being the same property described in the mortgage assigned to the complainant,) "subject to two certain liens by judgments and executions against the company, to wit, one in favor of Joshua Doughty, and one in favor of the president, directors and company of the State Bank at Elizabeth." This deed contains covenants by the company, that the property is not encumbered by any encumbrance whatever, except as before mentioned, and that the company will warrant and defend the premises to the said Loomis and Lyman, freed and discharged from all encumbrances. This deed is signed by the president, and sealed, and is acknowledged by him before George H. Brown, master in chancery, to have been signed, sealed and delivered by him, in the name of, and as the voluntary act and deed of, the company.

By an exemplification of the proceedings in the Court of Chancery of New York, exhibited on the part of the complainant, it appears that the bond and mortgage from Bowen to Van Hook, on the property in New York, spoken of by the witness Selden, were dated May 20th, 1840, and conditioned for the payment of \$10,000, in one year, with interest at seven per cent. This mortgage recited that George P. Rogers had, by a lease dated October 14th, 1837, demised to Dudley Selden all that lot of land, &c., to hold from May 1st, 1837, for the term of seventeen years, at the yearly rent of \$31.50; that Selden, with the consent of George P. Rogers, had assigned the lease to Colburn; that to secure part of the consideration of the assignment, Colburn had executed a mortgage to Selden; that afterwards, on the 27th of November, 1839, the interest of Colburn in the lease had been sold by a master in chancery to the said Bowen, by deed dated April 6th, 1840; that Bowen mortgaged to Van Hook the said unexpired term, and the lease and all the advantages of renewals and buildings and improvements. The said recited mortgage was only of Colburn's interest in one



---

Van Hook v. Somerville Manufacturing Co.

---

of the lots. There was another mortgage of the leasehold interest in two of the lots, reciting a lease dated April 26th, 1833, for twenty-one years, yielding for each of the lots the yearly sum of \$63. Dudley Selden mortgaged the leasehold interest in said two lots to Van Hook. The property is in Thirteenth street, Fifteenth avenue. The bond and the said two mortgages were to secure \$10,000. The bill filed in that case states that Jacob Acker has or claims some interest in or lien upon the said premises prior to the said mortgage of Van Hook, the complainant in that cause, and prays, among other things, that after satisfying the prior liens on said premises, if any, the complainant may be paid out of the residue of the proceeds.

The answer in that case sets up usury, and states, among other things, an assignment by Bowen in trust for the benefit of his creditors, dated June 1st, 1841.

On the 14th of December, 1841, an order for proofs was made in that case. The testimony was closed February 21st, 1842. On the 8th of April, 1842, that cause was brought to hearing on the pleadings and proofs, and it was referred to a master to compute the amount due Van Hook, the complainant in that cause. A final decree was made on the 9th May, 1842. On the 8th of September, 1842, the master's report of sale was confirmed, unless cause to the contrary should be shown in eight days.

A paper writing, purporting to be a copy of a mortgage given by Henry L. Stebbins to John B. Morgan, dated August 23d, 1842, was exhibited and marked Exhibit B on the part of the complainant.

Copies of three several deeds from the complainant to Henry L. Stebbins, for the New York property, were exhibited and marked Exhibits F, G and H on the part of the complainant.

A copy of a deed from William Mitchell, master in chancery of New York, to the complainant, was exhibited and marked Exhibit I.

The cause came on to be heard on the pleadings and proofs, the term of June, A. D. 1845.

---

Van Hook v. Somerville Manufacturing Co.

---

*Blauvelt* and *P. D. Vroom*, for the complainant. They cited 2 *Ball & Beatty* 319; 1 *Ib.* 151, 340; *Ambler* 436; 5 *Wheat.* 420; *Angell & Ames on Corp.* 73, 74, 158, 159, 160, 378; 2 *Kent's Com.* 293.

*S. P. Lyman* and *G. D. Wall*, for the defendants. They cited. *Angell & Ames on Corp.* 151, 190, 242, 247, 390, 406; 2 *Kent's Com.* 298, 463, 468; 4 *Peters* 152; 4 *Wheat.* 636; 7 *Serg. & Rawle* 530; 2 *Wendell* 308; 7 *Ib.* 31; 6 *Hal.* 116, 119.

THE CHANCELLOR. The first question I shall consider is, whether the bond and mortgage are the acts of the company. Were they so executed as to bind the company?

The third section of the act of incorporation provides that the stock, property, and concerns of the company shall be managed and conducted by five directors, being stockholders, one of whom shall be president, and that the president and directors may make and ordain such by-laws and regulations for the government of the corporation, and for the management of the stock, property, effects, and concerns of the company, as may by them be deemed necessary and convenient, and that the president and directors, or a majority of them, shall and may appoint such officers, superintendents, and agents as they may think proper, and may remove the same at their pleasure.

The fourth section provides that the said president and directors, or a majority of them, shall have power to call in stock, from time to time, in such installments as they shall see fit to prescribe; and, by the last clause of the eighth section, it is provided that, on the death or resignation of any director, the remaining directors shall choose, from among the stockholders, some fit person to fill the vacancy, who shall hold his office till the next annual meeting.

Under this act, what is the mode of expressing the binding will of the corporation? If, on due notice to all the directors, three only meet, can a majority of them bind the corporation? It is said, in 2 *Kent's Com.* 293, that there is a distinction taken between a corporate act to be done by a select and definite body, and one to be performed by the constituent members. In

---

Van Hook v. Somerville Manufacturing Co.

---

the latter case, a majority of those who appear, may act, but, in the former, a majority of the definite body must be present, and then a majority of the quorum may decide. This, the author says, is the general rule on the subject; and if any corporation has a different mode of expressing its binding will, it arises from the specific provisions of the act of incorporation.

The act incorporating this company does not give, specially, any definite mode of expressing the will of the corporation. It does not say, in words, that the concurrence of three of the five directors shall be necessary to bind the corporation, nor that three shall be a quorum. The provisions, in this respect, differ, in words, in different parts of the act. In two clauses, the words, "or a majority of them," occur. These clauses authorize the president and directors, or a majority of them, to appoint officers, and to call in installments. Is it intended that, when three are duly met, two of them may make the appointments, and call in installments, or is the concurrence of three of the five necessary? I have great difficulty in supposing that the legislature, when they say that a majority of the five may appoint officers and call in installments, intended that two of the five might do it, if a third should be present, though he should vote against it. If, in these clauses, this was not intended, was it intended to give a different rule in the other clauses? The act of a majority of those who, by the charter, have a voice in the corporate deliberations, will bind. The question is, what shall be considered the act of that majority? Mr. Kyd says that in different corporations, the manner in which the majority shall be reckoned, varies according to the provisions of the charter. Sometimes, the act that is to bind must be sanctioned by the assent of an absolute majority of the body empowered to act; sometimes, it is sufficient if a majority of the body be assembled, and the majority of those assembled agree to the act. *Kyd* 309.

Which of these rules does this act give—or does it give different rules for different purposes? Does it require the concurrence of three voices to appoint an agent, and of only two to make a deed? Lawrence, Justice, in *Witherall v. Gartham*, 6 *T. R.* 592, says: "In general, it would be the understanding of a plain man, that when a body of persons is to do an act, a



---

Van Hook v. Somerville Manufacturing Co.

---

majority of that body would bind the rest." I think a plain man would quite as readily understand, that a minority of the body could not, under any circumstances.

Without deciding what is the construction of the act in this respect, (for I have disposed of the cause on other grounds,) I am willing to say that the experience of New Jersey in reference to the proceedings of corporations, furnishes strong arguments to her judicial tribunals, to induce them to look narrowly into the powers given by acts of incorporation. But, under both these clauses, not less than three can constitute a board to do a corporate act. Could Stebbins, with two other directors, constitute a board to vote a mortgage from the company to him? I think not. A member of a corporation contracting with it, is regarded, as to that contract, as a stranger. *Ang. and Ames* 168, 169; 1 *Kyd on Corporations* 180.

This brings us to an inquiry of fact in the case. Were there three directors other than Stebbins present, duly assembled, at the meeting or meetings at which the acts necessary to bind the company by this bond and mortgage to him, were done? It is shown by the testimony of Brown and Packer, that at the meeting of the 10th of January, 1842, but three of the directors were present, and Stebbins was one of them. This fact is uncontradicted, unless the minutes are sufficient to overcome this direct testimony, and to show that four of the directors were then present. "The books and minutes of a corporation, if there is nothing to raise a suspicion that the corporate proceedings have been irregular, will be treated and referred to as evidence of the legality of the proceedings." *Angell and Ames* 407. However regular and free from suspicion on the face of them, they would be but *prima facie* evidence. I have examined the minutes carefully. The appearance of them is too suspicious to allow them to overcome the testimony of Brown and Packer. It is plain that at the meeting of the 10th of January, there were but two directors present besides Stebbins. As to the word "board," as used by the witnesses, it is evident they use it without regard to the question whether a meeting of three directors, including Stebbins, would be a competent board to give a mortgage to him.

The meeting of Gaston, Packer and Stebbins, on the 10th,  
VOL. I. L

---

Van Hook v. Somerville Manufacturing Co.

---

of January, the minutes of which say that a resolution was then passed, ordering the president to sign the bond and mortgage and affix thereto his own seal, which was thereby acknowledged and adopted as the seal of the company for that purpose, was not a legal board for the purpose of giving a mortgage to Stebbins. But the affixing the seal of a corporation is a ministerial act, and may be done by a less number than is necessary to constitute a board, if it be done by the direction of a legal board. *Angell and Ames* 155, 158, 406. Was there any previous meeting of a legal board for giving a mortgage to Stebbins, at which the affixing the seal to the bond and mortgage was directed to be done? The minutes, as they now appear, show, under a heading of a meeting on the 5th of January, 1842, which states that Gaston, Stebbins, Van Renselaer and Packer were present, and prior to the heading of the meeting of the 10th, two entries, one directing the president to execute the bond and mortgage and affix thereto a common seal, and the other, stating that that meeting was then adjourned to the office of George H. Brown, esquire, January 10th, at 5 P. M., 1842. When these two entries were made was not shown. The secretary of the company was not examined, nor did the book of minutes appear at any of the examinations of witnesses; nor does the witness Brown, say that he saw the book of minutes and these entries in it, at or before the execution of the bond and mortgage. It is obvious that it may have been supposed by some person, at some period before the bond and mortgage were assigned, that such a state of the minutes as would appear to show an adjournment from a former meeting at which three directors besides Stebbins were present, might put the question of the validity of the bond and mortgage on a better footing than if it stood simply on the resolution appearing in the minutes of the meeting of the 10th, the heading of which does not state how many or who were present. A careful examination of the minutes, compared with testimony, has satisfied me that the entry stating an adjournment from the 5th to the 10th, is not a correct entry; and that it was made, not on the 5th of January, but at some subsequent time. [The reasons for this conclusion are here stated.]

There may have been another reason for introducing this

---

Van Hook v. Somerville Manufacturing Co.

---

entry of adjournment from the 5th to the 10th. The heading of the minutes of the meeting of the 5th is, "At a meeting of the board of directors of the company, at the house of John Torbert, innkeeper, pursuant to notice duly given to *said directors respectively*, the following persons were present ;" naming Gaston, Van Renselaer, Stebbins and Packer. It may have been supposed that the entry of an adjournment from the 5th to the 10th, would have the effect of making the meeting of the 10th appear to be a meeting on due notice. Whether this would be so, if all the directors were not present at the first meeting, is at least doubtful, in reference to business of an extraordinary character. The entry of an adjournment was made for some purpose, and was thought necessary or proper by some person, for some purpose ; but, from the appearance of the minutes, in connection with the testimony, I think it was not made in accordance with the fact.

As to the resolution appearing on the minutes as of January 5th, 1842, directing the president to execute the bond and mortgage and affix thereto a common seal, the book of minutes furnishes no evidence to be relied upon, that it was passed at a meeting on due notice, at which three directors, besides Stebbins, were present—no evidence that it was passed by a legal board. And Van Renselaer, who from the minutes would appear to have been present, says he has no recollection that at a meeting of the board an order was made directing a mortgage to be given to Stebbins. He says he knows a mortgage was given, sanctioned by the board, and that he consented to it. This does not prove that he was present at the meeting which, he says, sanctioned it ; and the consent of an individual director, not sitting in a legal board, is nugatory. If Van Renselaer was not present, then it could only have been sanctioned at a meeting of three, of whom Stebbins was one, for it is shown that Ibbotson was absent, out of the state.

If I am right in the conclusion to which I have come from an examination of the book of minutes and of the testimony, then the resolution appearing on the minutes as of January 5th, 1842, directing a bond and mortgage to be given to Stebbins, depends for its efficacy on a simple entry of a resolution, on minutes of very suspicious appearance, without any



---

Van Hook v. Somerville Manufacturing Co.

---

statement of a meeting of the board, without stating who were present, or the presence of any one, without any proof of notice of the meeting, and without proof *aliunde* that a board was present, and against the testimony of one of the directors that he has no recollection of such a resolution being passed at any meeting of the board, and against the presumption of the absence of another of the five directors, Ibbotson, arising from his non-residence. It appears to me that it would be going too far to say that such an entry as that of this resolution of January 5th, is binding on the corporation.

Again, this was a business of an extraordinary character, the mortgaging the real estate of the corporation. Is an entry in the minutes, even if free from suspicion, that the meeting was held on due notice, sufficient evidence of it, if it appears, as it does here, that all the directors did not attend? Indeed, the true reading of the heading under which this was introduced is, that it was on due notice to the directors who attended.

On the question, then, whether this bond and mortgage were legally given, so as to bind the corporation, there are several matters about which I am not satisfied. I am not satisfied that under this charter, the concurrence of less than three affirmative voices out of the five directors will bind; nor that the meetings which passed the resolutions of January 5th and January 10th, 1842, were duly assembled; nor that three of the directors besides Stebbins voted for either of them; nor that Stebbins, with two other directors, could constitute a board to direct a mortgage to be given to him. But as to these matters, I do not give a decided opinion. My view of the case on another ground of defence, has led me to a conclusion satisfactory to my mind, and I shall decide the cause on that ground.

The ground of defence now to be examined is, that the mortgage was given to Stebbins as the agent of the company, to enable him to raise money for the company, on his representation to the directors that the money needed by the company could not be raised on the bond and mortgage of the company direct to any lender; or after failure so to raise money, and on his representation that he could raise it on a bond and mortgage of the company executed to him, by an assignment of it to some person, allowing the lender a premium or greater rate of inter-

---

Van Hook v. Somerville Manufacturing Co.

---

est than the legal interest, and that this was the only way in which the money could be raised ; and that the mortgage was given under such circumstances (which it is contended are shown in evidence) that to enforce it against the company would be a fraud on the directors and the company ; in short, that as a mortgage of the company to be used by Stebbins against them, it was procured by fraud.

If these papers were obtained for the purpose of raising money for the company, and are fraudently attempted to be used by the party obtaining them, as securities given to him for his own benefit, it will be considered that when he obtained them, and in using the means of obtaining them, he entertained the design of using them for his own benefit, and that therefore he obtained them fraudulently.

I am of opinion that the bond and mortgage were not good in the hands of Stebbins against the company. He acted as the general and financial agent of the company. (It is not material to the present purpose, to inquire whether such an agent can be legally appointed, and a director can be such an agent.) On the 1st of January, 1841, a resolution appears on the minutes of a meeting at which Gaston, Van Renselaer, Stebbins, and Packer are stated to have been present, authorizing Stebbins to negotiate a loan of any sum not exceeding \$5000, and to give a bond of the company and a mortgage on their factory and the lot on which it stands, to secure the payment thereof. On the 23d of August, 1841, a resolution appears, without any heading of a meeting or statement who were present, that J. N. Stebbins, agent of the Somerville Manufacturing Company, is authorized to loan money from the State Bank at Elizabethtown, from time to time, by notes or drafts, provided the liability of said company shall not at any time exceed \$1500. On the 5th of January, 1842, two resolutions appear, one, a resolution that a bond and mortgage be executed to the State Bank at Elizabeth, to secure the personal liability of the president and directors of the Somerville Manufacturing Company to said bank, for money loaned or to be loaned, the sum not to exceed \$1500 ; the other, a resolution " that the president is hereby authorized and directed to execute a bond and mortgage to Jared N. Stebbins, for \$9600 ; payable in three

---

Van Hook v. Somerville Manufacturing Co.

---

years from date, the interest to be paid annually and every year."

Each of these resolutions, except the last, shows on its face the object for which the securities mentioned in it are to be given. The last simply authorizes and directs the president to execute a bond and mortgage to Jared N. Stebbins for \$9600, without stating the reason or the object or purpose why or for which it was to be given.

The first resolution is, that Stebbins negotiate a loan of \$5000, on the bond and mortgage of the company to the lender. This mode of borrowing money failed. Through the course of the year other means were used for borrowing money, with some success, but not to the amount required; and on the 5th of January, 1842, the last of the said resolutions was adopted, (supposing for this part of the case that it was legally adopted,) directing a bond and mortgage to be given to Stebbins, without saying for what reason or consideration; and Stebbins now claims that this mortgage is a valid security in his hands, and seeks to enforce it against the company. This would be the state of the matter as between Stebbins and the company.

Three of the persons who were directors at the time of the transaction, have been sworn in the cause—two of them called on the part of the defendants, and the other on the part of the complainant—in reference to the object of giving the mortgage, and the manner and means in and by which those of the directors who voted for it, were induced to do so. [The testimony on this part of the case is here examined.]

The closing counsel for the complainant contended that the amount of the testimony was this: that Stebbins was to raise the money on the mortgage given to him for his debt, and to appropriate some \$2000 or \$3000 of it to pay the debts of the company, and to make advances as one interested in the company. This explanation is hardly satisfactory. The conclusion I have reached is, that as a bond and mortgage to be used by Stebbins against the company, they were procured by fraud.

The next question is, will the bond and mortgage be good in the hands of Van Hook, if he be a *bona fide* holder? The



---

Van Hook v. Somerville Manufacturing Co.

---

case of *Barrow v. Bispham*, in the Supreme Court of this state, 6 *Halst.* 119, decides that the assignee of a bond takes it subject to all the equities which existed against it in the hands of the obligee, and that fraud in the obligee in obtaining it is a good defence against the assignee, though he purchased it for a valuable consideration, and without notice of the fraud.

This principle may not be fully applicable to this case. These securities (assuming now that they were legally executed) were executed to Stebbins, the agent, to enable him to raise money for the company by an assignment of them. If the agent had used them in the manner contemplated, and obtained the money, the company would be liable on them, though the agent failed to apply the money to the use of the company. Can securities made to an agent, to be by him assigned to raise money for the company, be resisted, in the hands of a *bona fide* assignee, on the ground that he assigned them for real estate, for purposes of his own? I am inclined to think that the rule in 6 *Halst.* should not be applied in this court, in a case like this, against a purchaser in good faith and without notice. Is the complainant such an assignee?

First, as to good faith, irrespective of notice. In this inquiry it must be borne in mind that Stebbins, in the measures taken during the progress of what he called the negotiation, was acting with the knowledge that the mortgage was executed to him to raise money for the company, and yet with the design, as proved by the result, of making it available for his own benefit. I think it cannot be doubted that he was acting under the conviction that it would be resisted, if attempted to be used by *him* against the company as a mortgage for his own benefit. His object, then, would be to get it into the hands of one who should claim as assignee, and to get as much as he could from the officers of the company to strengthen the claim of the assignee. I think it will be manifest that the whole course of proceeding connected with the assignment, is consistent only with this design on the part of Stebbins, and is inconsistent with the idea that the complainant was a real purchaser in good faith. No man, acting with sincerity and good faith, would have been satisfied to buy this mortgage, and pay for it on the credit of the papers which Stebbins procured from the president and secretary

---

Van Hook v. Somerville Manufacturing Co.

---

of the company. And I am clearly of opinion that he never did buy and pay for this mortgage—a mortgage on a manufacturing site without water-power, and to which a lease of water had been refused. The certificates and suppletory resolutions, or copies of what purported to be resolutions, were procured by Stebbins, and at his instance, with a view to aid the mortgage in the hands of an assignee for his own benefit.

A certificate of John I. Gaston, and another writing signed by him, which it is difficult to characterize, and a copy of what purports to be a resolution of June 28th, 1842, are exhibited on the part of the complainant. The certificate is dated June 28th, 1842, and is signed John I. Gaston, without addition, and purports to certify that a bond and mortgage for \$9600 was given and executed by him to J. N. Stebbins, as president of the Somerville Manufacturing Company, by order of the board of directors, as said amount was due him as agent of the company, and that he knew of nothing that could be brought against said claim in abatement, or in any way destroy its validity.

The resolution of June 28th, 1842, of which a copy is exhibited, signed J. A. Gaston, secretary, is as follows:

“At a meeting held June 28th, 1842, the following preamble and resolution were adopted: Whereas a certain bond and mortgage, given by the Somerville Manufacturing Company to Jared N. Stebbins, for the sum of \$9600, bearing date the 10th day of January, 1842, has been this day submitted to the inspection of this board; and the same having been considered and examined, it is resolved, that the said bond and mortgage is a legal and subsisting liability of the said company, and that they have no defence to make to the same, either in law or equity.

“June 28th, 1842.

J. A. GASTON, Secretary.”

A letter had been written by Stebbins to Gaston, from New York, dated March 29th, 1842, in which he says he finds obstacles in the way of negotiation; that he wants a certificate from Gaston, as president, that the bond and mortgage is a valid one, given him for the amount due him. On the 28th of June, 1842, he receives the foregoing paper, signed by John I. Gaston, not as president, and stating, not “that the bond and mortgage were valid, given him for the amount due him,” as requested by the letter, but, that they were given and executed

to Stebbins, "as said amount was due said Stebbins, as agent of the company."

If the mortgage had been given to Stebbins for an amount due him, why was it that Gaston not only omits to sign, as president, but falls short of saying what the letter asks? The truth of Gaston's deposition, that he gave the certificate for the same purpose the bond and mortgage were given for—to enable him (Stebbins) to make the loan—to aid him in making the loan—and that he never gave Stebbins a certificate that the company had given him the bond and mortgage for any debt due him from the company, is confirmed by the language of this so-called certificate. Gaston was willing to say as much as he could in aid of that object, but the restraint of the language of the certificate is manifest. The design of Stebbins, before spoken of, is obvious from the language of the letter. In view of the fact, as it appears by the result, that Stebbins was about putting these papers in the hands of an assignee, for a deed to his son of property in New York, it is plain that he was availing himself of the pressure on the company for money, to procure from the president what he supposed might give effect to the mortgage in the hands of an assignee. But Gaston, even under the pressing necessities of the company, would not give the certificate asked, though acting under the belief that Stebbins was honestly endeavoring to negotiate the mortgage for money for the company. This certificate is exhibited by the complainant to show good faith in him in taking the assignment. (It will be recollected that the negotiation, as Stebbins called it, which ended in the alleged trade for the New York property, commenced some months before the 28th of June. (Did the complainant require the certificate Stebbins wrote for? If he did not, then its procurement by Stebbins, and its production now, by the complainant, are consistent only with the design of Stebbins, before stated, and with a want of good faith in the complainant. If it was at his suggestion that Stebbins wrote on the 29th of March, asking the certificate mentioned in that letter, would what Stebbins, after the lapse of three months, procured, have been satisfactory, to one proposing in good faith, to buy the mortgage? Its language was short of what the letter asked, and



---

Van Hook v. Somerville Manufacturing Co.

---

it was not signed by Gaston, as president; and, if what was requested to be certified, was true, Gaston could have had no hesitation in giving the certificate in the language of the letter, and signing it as president; and, besides, the certificate, if given as required, would be no evidence whatever of the fact it purported to certify. The only object that could have been had in procuring it was, that it might furnish some evidence of good faith in the complainant in taking the assignment. The resort to such means, in view of the inquiries he put, and of others he failed to put to Gaston, when Stebbins took him out to Somerville, are little calculated to show his good faith, or to satisfy us that a man of the business capacity of the complainant would, or did part with his property, and put it out of his control, on the faith of such a paper.

But this letter of Stebbins went further, and said: "The best way is, to copy the resolution on the books, provided there is nothing else in the said resolution." An entry of a resolution appears on the minutes, of the same date with the said certificate—June 28th, 1842. It is the entry, a copy of which, signed J. A. Gaston, secretary, is before given. This entry, and the copy of it, signed by the secretary, and the above certificate of Gaston, were made for the purpose of removing the obstacles which Stebbins said he found in the way of negotiation. Stebbins wanted a resolution "that the bond and mortgage is a valid one, given him for the amount due him," "provided there is nothing else in said resolution;" and he wanted the certificate of the president to the same effect.

To show Stebbins' idea of the way in which things might be done, and the boldness with which he availed himself of the pressure on the company for money, in order to get from Gaston something which he hoped might make the mortgage good in the hands of an assignee, we have only to ask how, according to his notions, such a resolution and certificate were to be made. Ibbotson was absent; Van Renselaer lived out of the state, and he testifies that "he knew nothing of the resolutions of the board or the certificates of the president, in relation to the mortgage, at the time of the transfer to Van Hook, or of the machinery by which said resolutions and certificates were

---

Van Hook v. Somerville Manufacturing Co.

---

obtained which resulted in the negotiation of the mortgage, he not having been present at any of the meetings of the board when the resolutions were passed and the certificates were given;" and Stebbins was in New York when he wrote the letter. This left but two of the directors, Gaston and Packer, to comply with the requirements of his letter.

How it is that this certificate and entry of a resolution and copy of it were not made till June 28th, does not appear. Three months elapsed before the certificate, such as it was, was given. I suppose the truth to be, that Stebbins' immediate presence and aid were necessary to procure them; and inasmuch as Van Hook could not make a deed for the New York property till after he should get a deed for it under his foreclosure suit, and Stebbins could make no arrangement with any one else to take an assignment of the mortgage, the delay worked no injury to either of them. What would be the effect of the delay on the mind of a person intending, in good faith, to buy the mortgage, is another matter. But the entry of this resolution was at length made, and the copy of it and the certificate of Gaston, as above given, were procured. The resolution was either caused to be entered by Gaston alone, or by Stebbins and Gaston, or at best, at a meeting composed of Gaston, Stebbins and Packer. Packer says he cannot say whether he was present or not. And if he was, it would not be a competent board for the purpose, for the reason that if it was, then a mortgage to one of five directors might be declared to be a legal and subsisting liability of the company by a vote of that director and one other. But this entry is, in its terms, still less a compliance with the request than the certificate of Gaston; and as to the form of it, it is headed thus: "At a meeting held June 28th, 1842, the following preamble and resolution were passed." Who were present at the meeting? where was it held? by whom was the resolution passed? It cannot be that the complainant, in good faith, bought the mortgage on the credit of the papers exhibited by him in the cause.

Another paper is exhibited on the part of the complainant. It is the one which I have before said it is difficult to characterize; a writing at the foot of a statement of Stebbins' account against the company. It is in the handwriting of John I. Gas-

---

Van Hook v. Somerville Manufacturing Co.

---

ton, and reads thus: "The board of directors having examined the above account, do pass the same, and acknowledge a balance due J. N. Stebbins of \$9638.17. Signed by order of the board.

"JNO. I. GASTON, President.

"January 5th, 1842."

What is the character of this writing? It does not purport to be a certified copy of a resolution, but would rather seem to purport to be an original resolution, or perhaps more like a certificate of Gaston that such a thing was done. When was it furnished, or sent, or given to Stebbins? There can be no doubt it was one of the papers sent or given to Stebbins in compliance with his request in his letter of March 29th, 1842, or on a similar request further urged by him afterwards; and hence the singularity of its form. The date put to it is not the date at which this writing, or certificate, or whatever it may be called, was made, but purports to be the date at which what is said in the writing to have been done was done. The form of this writing adds another proof that all the exhibits on the part of the complainant were got up long subsequently to the execution of the mortgage, at the instance of Stebbins, to serve his design; and that the nature of the transaction between Stebbins and the complainant, as it finally resulted, was different from that of a *bona fide* purchase of this bond and mortgage. Does Gaston, by this writing, say that the board passed such a resolution on the 5th of January, 1842? Certainly not. If such a resolution had been passed at that date, and then placed on the minutes, it cannot be imagined that such a nondescript writing as this would have been resorted to; a copy of such resolution, if it had been so passed, made in such a way as to satisfy a man proposing in good faith to buy the bond and mortgage, would have been required and made. The production of such a paper amounts to less than nothing on the question of the good faith of the complainant. "The board of directors, having examined," &c. Is this the form of a resolution as it would appear on the minutes? The very form of this writing, instead of giving satisfaction, carries plain and strong marks of suspicion. Who were present when any such resolution was passed? who constituted, or pretended to constitute, a board to pass it? and how were they assem-



---

Van Hook v. Somerville Manufacturing Co.

---

bled ? was Stebbins himself one of them ? As to these matters the writing is silent. And, what is quite as singular, Gaston, though produced as a witness in the cause on the part of the defendants, was not shown this writing by the complainant, nor asked when or where any such resolution was passed. Why Stebbins should not have the question asked is sufficiently plain, but why the complainant, if he was a *bona fide* assignee, having produced this paper to show his good faith, should omit to do so, I am at a loss to understand. The production of these papers, exhibited on the part of the complainant, furnishes no evidence of his good faith in this transaction : in my judgment they disprove it. If he was acting in good faith he would not have relied on writings of such a character, and produced to him by Stebbins, the man from whom he was to take the assignment.

But it was thought best that Van Hook should seem to have made inquiries for himself, and accordingly he rides out to Somerville with Stebbins. He stops at John I. Gaston's ; does not go to see the property. Gaston testifies that Van Hook made no inquiry about the mortgage being given to Stebbins for a debt due to Stebbins ; nor any inquiry as to the means of the company for completing the works ; nor any inquiry as to the water-power, or whether a lease for water could be procured ; nor, though on the spot, does he make any inquiry for the minutes, or as to the action of the board in reference to the giving of the mortgage. Gaston's testimony on this part of the case is as follows : " Mr. Van Hook stopped at my door and told me he had come out to see about loaning Stebbins *the money* on the bond and mortgage ; I told him we wanted about \$10,000 to set the property a-going and pay the debts, and that Stebbins said that sum would do it ; that I considered the property would be worth \$20,000 when in operation." " I told him that if he had the *money* to spare, he could not put it out more safely ; that we were anxious to get the *money* and have the works in operation ; Mr. Van Hook said he could furnish the *money* if he was satisfied with the security, but that he did not wish to run any risk, as he had already lost some money before on loans made for other persons." " Van Hook made several inquiries as to the value of the property." " I never

---

Van Hook v. Somerville Manufacturing Co.

---

made the least intimation to him, or any other person, that the money was to be raised for the benefit of Stebbins." "Mr. Van Hook did not inquire as to the means of the company for completing the works, but I told him that if we could obtain the *money* on the bond and mortgage, we would be able to put the works in operation, and that then the property would be valuable." Let it be recollected here that Van Hook claims to recover on this mortgage on the allegation that he gave a deed for *real estate* for it.

Again, at a meeting of the water-power company, said to have been in June or July, 1842, Stebbins said he could not negotiate the mortgage without a lease of water for the use of the Somerville Manufacturing Company. He had before written to Gaston, saying, "I have found a person who has \$10,000 to loan at seven per cent. and will let me have it on the mortgage, provided the property on which it is a lien is worth \$20,000; but he objects until I get some certainty for water without any question; he does not like any chance of a law-suit; it must be a first mortgage; this can be got along with, either by paying up the \$1500, or keeping it back, as we shall hereafter agree upon." This letter was produced on the part of the defendants. It shows the design of Stebbins. The mortgage would be of no value without a lease of water. Then in June or July he still presses the water-power company for a lease of water, saying he could not negotiate the mortgage without it, and it is refused; and it is quite clear from the testimony, that without water the property as it then stood was of little value, compared with the sum named in the mortgage. But the effort to get the lease fails; yet this failure to procure water makes no difference to the complainant, the alleged exchange proceeds, notwithstanding, and Van Hook takes an assignment of the mortgage, not paying *money*, which Gaston told him they wanted, to put the works in operation and make the property valuable and good security for the money, but making a deed of real estate to Stebbins' son, and telling us by his witness, the land broker, that Stebbins' son made a mortgage on that real estate to a Mr. Morgan.

Again, the conversation between Van Hook and Gaston, in which Van Hook, while this alleged trade for real property was

---

Van Hook v. Somerville Manufacturing Co.

---

going on, told Gaston that he had come out to see about loaning the *money*, and that he could furnish the *money* if he was satisfied with the security, and in which Gaston told him what is before stated to have been told him by Gaston in that conversation, of what the money was wanted for, and how it was to be applied, shows, in my judgment, to the conscience of a court of equity, both *suggestio falsi* and *suppressio veri*, on the part of Van Hook.

Can it be believed that a man acting in good faith, and really intending to give real estate for this mortgage, would have made such a representation to Gaston, or, on receiving the information Gaston gave him, would have omitted to inform Gaston that Stebbins proposed to trade the mortgage for real estate in New York? Can there be a doubt that if he had done so, as he most assuredly was required in honesty to do, the company would have taken immediate means to protect themselves against the faithlessness and designs of Stebbins?

This part of the case is consistent with all the features of the transaction, as well those before examined as the subsequent parts of it; and, instead of showing good faith in Van Hook, it makes him a party to the fraud of Stebbins. I cannot understand how a man acting in good faith could proceed with the trade after this; but I think I can understand how two men, determining to proceed after this, should proceed as they did—that is, have the deed from Van Hook for the New York property made to Stebbins' son, (who, it will be recollected it is testified, when a subpoena to appear as a witness was handed to him, read it, and said he did not know what it was; that he did not know anything about it; that he did not know Van Hook;) and have Stebbins' son make a mortgage to one John B. Morgan. Again I ask, could a man in good faith, on the production of such papers, and after the information he got from Gaston, have bought and paid for this mortgage? It requires stronger faith in the complainant's simplicity than I have, to believe it.

The closing scene of the transaction is just such as was to be looked for. No evidence was given to show when the assignment to the complainant, or the deed to the son, or the mortgage made by the son, was delivered; but it appears that



---

Van Hook v. Somerville Manufacturing Co.

---

an assignment of the bond and mortgage was left by Stebbins in the office of the clerk of Somerset, and recorded after the 9th of August, 1842; that, on the 8th of September, 1842, the report of the master in chancery in New York, of the sale of the New York property to Van Hook, was confirmed, unless cause to the contrary should be shown in eight days; and that the deed for that property, from the master in chancery in New York to Van Hook, was recorded on the 19th of September, 1842; and the mortgage from Stebbins' son to Morgan is *dated* August 23d, 1842.

The complainant's witness, Jones, would seem to ask us to suppose that young Mr. Stebbins, under these circumstances, borrowed \$8000 on the mortgage executed by him of this New York property, dated August 23d. It would have been a relief if Mr. Morgan, or somebody acquainted with this part of the transaction, had been examined, to tell us something about this mortgage, when it was delivered, and to whom, and what given for. If it was given for the benefit of Jared N. Stebbins, and had no connection with the transactions between Van Hook and him, and Van Hook actually parted with the New York property, and has no control over it by means of this mortgage to Morgan, it would have been very easy for J. N. Stebbins or Van Hook to produce evidence to satisfy us of this; and Stebbins, as well as Van Hook, was interested to do so. Instead of this, and though Van Hook, under the pressure of the case in another view of it, puts forward this mortgage from Stebbins' son, no account of it is given, except that Jones, a witness produced by the complainant, and who produced a *certified copy of the mortgage*, says that he had seen it in New York the morning of the day of his examination, in the hands of one Edward P. Clark, and that "he could not get the original out of the office; they refused to let him have it."

More light might be thrown upon the subject by examining Jones' testimony in connection with a fact of which he did not speak, and which was not alluded to by the counsel on either side, for the reason, I presume, that the voluminous record of the proceedings in the chancery suit in New York was not read by either of them; and that is, the fact that, some time before the sale of the New York property by the sheriff to Van Hook,

---

Van Hook v. Somerville Manufacturing Co.

---

Bowen, against whom the decree in that case was made, had become insolvent and made an assignment for the benefit of his creditors. But I forbear to say more of this matter, than that we hear nothing of any assignment of that decree either to J. N. Stebbins, or to his son. In view of this fact, this part of the case is to be added to the pretences.

It appears to me, that under the proofs in the cause, irrespective of notice, the complainant is not entitled to be considered a *bona fide* purchaser, and, therefore, is not entitled to the application of equitable considerations to relieve him from the rule in *Barrow v. Bispham*.

I am of opinion, further, that the information he received from the president of the company, was sufficient notice to take from him the character of a *bona fide* purchaser without notice, if without that information he could have been considered such.

The bill will be dismissed.

Order accordingly.

REVERSED, 1 *Hal. Ch.* 633.

CITED in *Stevens v. Post*, 1 *Beas.* 417.

VOL. I.

M

# CASES IN CHANCERY.

DECEMBER TERM, 1845.

---

JOSEPH ENGLE v. ABRAHAM HAINES AND WIFE, SAMUEL  
ROSS AND OTHERS.

1. If a mortgagor, subsequently to the mortgage, sells and conveys a part of the mortgaged premises, an equity arises in favor of the purchaser, to have the part which remains in the mortgagor first sold for or towards the payment of the mortgage.

2. But if the purchaser agrees with the mortgagor that the part he buys shall be subject to the mortgage, and that the amount due on the mortgage shall be a part of the consideration he is to pay, equity will not interpose to subject the part of the mortgaged premises remaining in the mortgagor to be first sold.

3. And a subsequent grantee of such purchaser from the mortgagor, with notice, has no better equity against the mortgagor.

---

On the 25th of March, 1821, Abraham Haines gave his bond of that date to Stacy Haines, conditioned for the payment of \$2000, with interest, in three years; and on the same day, with Agnes, his wife, executed to Stacy Haines a mortgage of the premises described in the bill, to secure the payment of the bond. On the 3d of May, 1823, Stacy Haines transferred the bond and mortgage to one Hinchman Haines; and on the 26th of October, 1841, Hinchman Haines transferred them to the complainant. On the 19th of March, 1839, Abraham Haines and his wife sold and conveyed a certain portion of the mortgaged premises to one Barclay Haines; and Barclay Haines, with his wife, on the 3d of April, 1839, conveyed the same to John W. Stitts; and on the 1st of July, 1840, Stitts conveyed



---

Engle v. Haines et al.

---

it to Charles and John White, and they, with the wife of said John, on the 11th of June, 1841, conveyed it to the defendant, Samuel Ross. The bill charges that all these conveyances were made subsequent to, and with full knowledge of, the said mortgage; and prays a sale of the mortgaged premises in satisfaction of the mortgage.

The answer of Abraham Haines, the mortgagor, states that the conveyance, mentioned in the bill, made by him to Barclay Haines, of a portion of the mortgaged premises, was made in consideration of \$1500; that \$1000 of that sum was paid to him by the said Barclay, and that, at the time of the said conveyance by him to Barclay, it was agreed between them that the portion so conveyed to Barclay was to be subject to the payment of \$500, due on the said mortgage on the whole premises, with interest thereon from March 25th, 1839, in relief of the residue of the mortgaged premises. That the sale of the said portion by Barclay to Stitts was made with a full knowledge, on the part of Stitts, of the said agreement between him, the mortgagor, and Barclay Haines; and that Stitts, at the time of said sale to him, gave to Barclay Haines a writing, of which the following is a copy: "I, John W. Stitts, have bought of Barclay Haines a certain tract of land, of about twenty-four acres, subject to a mortgage of \$500, held by Hinchman Haines, and to pay the interest up from the 7th of March last; said tract is situate in Evesham township, which said Barclay bought of his father, Abraham Haines." This answer then states that the Whites, at the time of the conveyance of this portion by Stitts to them, had notice of this agreement; and that Ross, at the time of the conveyance of this portion by the Whites to him, had notice of the said agreement, and that the portion conveyed to him was alone chargeable for the said \$500. The answer submits that this portion, so conveyed to and now held by Ross, should be first sold, because each of the subsequent purchasers had full notice, &c.

The answer of Samuel Ross was put in before the answer of Abraham Haines, and contains no denial of notice.

The testimony is as follows:

The writing mentioned in the answer of Abraham Haines,

---

Engle v. Haines et al.

---

as given by John W. Stitts to Barclay Haines, is exhibited and marked Exhibit A on the part of Abraham Haines.

Barclay Haines, for the defendant Abraham Haines, testifies that on the 19th of March, 1839, he bought of his father, Abraham Haines, the tract of about twenty-four acres, mentioned in the answer of Abraham Haines; that at the time he bought it, he understood there was a mortgage on it with other property of Abraham Haines, then held by Hinchman Haines; and that the amount due on the mortgage was \$500, with interest from March 25th, 1839; and that the balance of the mortgage had all been paid up; he was to give \$1500 for the tract he bought—\$1000 in trade and \$500 by paying the balance due on the mortgage; there was no written agreement between him and his father; it was expressly agreed between them that this land should be liable for the \$500 due on the mortgage; when he sold to Stitts, he gave Stitts notice that this tract was liable for the money due on the mortgage, and was to be alone liable for it; there was a written agreement between him and Stitts in reference to that sale; the agreement at first was verbal, but was afterwards reduced to writing and signed by Stitts, at the time of the delivery of the deed. The paper marked Exhibit A on the part of Abraham Haines, was here shown to the witness, and he said that it was the agreement referred to; that he saw Stitts sign it; that it is witnessed by J. R. Value, who at the time was a clerk for Stitts; he does not think that Value lives in this state; he lived in Pennsylvania at the time of the execution of the paper; has never known him to be in Jersey since; Stitts was to give him \$1600 for the tract—\$100 in cash, \$1000 in trade, and the \$500 due on the mortgage, which was a part of the consideration; Stitts was to pay the interest from March 7th, 1839; he knows Charles H. and John F. White; they resided in Philadelphia at that time, and do still; he was at his father's when one of them and a Mr. Curtis, a scrivener, whose office was in Arch street, Philadelphia, drove up and inquired for Abraham Haines; they had a conversation with him in witness' presence; they wished to know of his father whether this tract was free and clear, or encumbered; he means the twenty-four acres spoken of; his father told them it was en-

---

Engle v. Haines et al.

---

cumbered by that \$500 mortgage; Curtis then said to White, that man Stitts would have cheated you, perhaps, if you had not come up; his father told them that I had sold Stitts that property, and that I had an agreement from Stitts, showing about that mortgage; they then asked me if I had that agreement; I told them I had, and produced it, and they both read it; Curtis then said to White, this shows the thing exactly—that there is a mortgage on that property for \$500; White requested Curtis to take a copy of the agreement, which he did; one of them, he thinks White, then asked who held the mortgage; I told them Hinchman Haines; they asked if I knew whether that money, the \$500, was wanted; I replied, I did not know; White asked if Hinchman Haines lived far distant; I told them the distance; they asked me to go there with them, to see him; we found him, and I introduced him to those gentlemen; White asked him if he held a mortgage on the property, describing what property; he said he did; White asked him if he wanted the money; he said he would like the money paid off, as there were so many endorsements on the bond—that it was covered with them; White told him he expected to buy the property, and if he did, he would like to make some arrangement about the mortgage—that if required, he would give a new bond and mortgage; that he would pay the interest up punctually, and pay all the back interest, and that if he got the property, he thought he would be able to pay off the principal within a year; on these terms, Hinchman Haines consented to let the mortgage lay for one year; White then asked Hinchman where he could send the interest money; Hinchman told him to the post-office at Marlton; they then parted; he does not remember which one of the Whites it was; it was one of them; they are in partnership together; he has a slight acquaintance with Samuel Ross, one of the defendants in this case; he had a conversation with Ross, previous to his purchasing this property; R. W. Howell, of Camden, counsel of Ross at that time, called to me as I was passing his office, and wished me to tell him what I knew about the title of this property which Stitts bought of me, and how it was situated as respected the encumbrances; he said Ross, a client of his, was about buying it; I told him how it was situated, and that it



---

Engle v. Haines et al.

---

was liable for this \$500, and alone liable; he then asked me to go with him to see Ross; I went with him, and saw Ross, at his factory in Camden; I then told Ross that this property was subject to the payment of \$500, as I had told his counsel before; I told Ross, at that time, what the agreement was between Abraham Haines and myself, when I bought the property, in the same manner I have stated in this examination, and also that I had sold it to Stitts subject to the mortgage, and that I had informed one of the Mr. Whites of its being liable for the said mortgage; I do not remember, exactly, the reply of Ross; he, or his counsel, said they were much obliged for the information; Ross and Mr. Howell were both present at the conversation.

Richard W. Howell, sworn on the part of the defendant Samuel Ross, testifies that he had a conversation with Barclay Haines, in his (Howell's) office, in relation to some part of the property bought by Ross of the Messrs. White; his recollection is, that a short time before the June Term, 1841, of the Gloucester Court, Barclay Haines called at his office to retain him in a suit; after arranging the business, witness mentioned to him that he had seen his name in connection with some property that Mr. Ross had either purchased or was in negotiation for with the Whites, and that it might be important for Mr. Ross to possess any information he might have in relation to it; Haines said he would accompany witness in calling on Ross; they found Ross at his factory in Camden; witness' impression is, that Ross was just about starting to visit this farm he either had purchased or contracted for with the Whites; witness mentioned to Mr. Ross that this was Mr. Haines, and stated that Haines knew something about the property, or some part of it; Haines went into an explanation of something relating to the property, which, at the time, witness thought might be important for Ross to know, but the particulars of which he does not recollect; witness had been spoken to by Ross before then, to draw a deed from the Whites to him; he does not recollect whether the conversation was before or after June 11th, 1841; he remembers that Ross did not seem particularly pleased, and rather cut short the explanation of Haines, by remarking that he was entirely satisfied; the substance of it was

---

Engle v. Haines et al.

---

this: that the Whites were honorable men; that he had nothing to fear from them, or that they would do what was right in the matter. [To a question here put by the counsel of Mr. Ross, whether, from what passed in the conversation between Ross and Haines, the witness understood that Ross had already purchased the property from the Whites, the witness says his impression certainly is that the negotiation was settled at that time.]

Cross-examined.—He cannot recollect whether he drew the deed before or after this conversation with Ross; his impression is, that the papers connected with the property were with him at this time, and had been for some time; he drew the deed that was executed; he drew another deed, which was not executed; there were some parts of it, cannot say what, but connected with the warranty, which he does not recollect, that was objected to by one of the Whites; it might have been about the \$500 mortgage, or it might not; he cannot recollect positively. [The deed which was executed contains only a covenant of warranty, and not a covenant against encumbrances.] The conversation he had with Haines, before going to Mr. Ross, was about an encumbrance on the property, or some part of it, the particulars of which he does not recollect; it was Mr. Haines' knowledge of the matter, whatever it was, that witness desired Ross to possess; he presumes Haines made the same statement to Ross which he had made to him, in substance, in relation to this matter, whatever it was, but Mr. Ross shortened the conversation; it struck witness at the moment that Ross was not particularly desirous of hearing Mr. Haines; his carriage was waiting for him at the time; witness cannot say whether at this time the deed was executed or not; he believes he should have taken Haines to Mr. Ross whether the deed was executed or not.

The cause was heard on the pleadings and proofs.

*Slatton*, for the complainant.

*Ten Eyck*, for the defendant Abraham Haines.

*Jeffers*, for the defendant Samuel Ross.

---

Engle v. Haines et al.

---

*Mr. Ten Eyck* cited 4 *Kent's Com.* 173, 174, 179; 1 *Johns. Ch. Rep.* 301, 303; 2 *Pow. on Mortgages* 553, and notes 576, 577, note 1, 561, note 6, 562.

*Mr. Jeffers* cited *Saxton's Ch. Rep.* 413; 1 *Green's Ch. Rep.* 439, 447, 448.

THE CHANCELLOR. Under the testimony in this cause, the twenty-four acre tract is first chargeable to the extent of \$500 and the interest due on it from the date of the conveyance from Abraham Haines to Barclay Haines. If a mortgagor, subsequently to the mortgage, sells and conveys a part of the mortgaged premises, an equity arises in favor of the purchaser, to have that part of the mortgaged premises which remains in the mortgagor, first sold for or towards the payment of the mortgage; but if such subsequent purchaser agrees with the mortgagor that the part he buys shall be subject to the mortgage, and that the amount due on the mortgage shall be a part of the consideration for the portion he buys, equity will not interpose to protect him, by subjecting the part of the mortgaged premises remaining in the mortgagor to be first sold. A subsequent purchaser of such portion from the grantee of the mortgagor, with notice of the facts, has no better equity against the mortgagor than the first purchaser.

I cannot, under the circumstances, direct the portion remaining in the mortgagor to be first sold.

AFFIRMED, 1 *Halst. Ch.* 632.

CITED in *Hoy v. Bramhall*, 4 *C. E. Gr.* 570.



---

Ware v. Ex'rs of Cook.

---

## JOSEPH C. WARE v. THE EXECUTORS OF MARY COOK.

The will directs in substance, that \$1500 be put at interest by the executors, and the interest be added to the principal from time to time, or the interest put at interest, and that one-half of said sum and of the interest which may have accrued when M. L. C. attains twenty-one, be paid to her, and that the other half be paid to J. C. when he attains twenty-one: and that if either die under age, leaving issue, his share be paid to his children; and if either die under twenty-one without leaving issue, the will gives the whole of said share and interest to the other, or to the children which the other, if dead, may have left. *Held*, that on the death of one under twenty-one, leaving issue, the issue are entitled to receive the half; and further, that the time of payment in that event is not postponed to the time at which the deceased parent would have attained twenty-one, if he had lived.

---

The bill states that, on or about March 22d, 1839, Mary Cook, since deceased, made her will, by which she directed, among other things, as follows: "10th. I order the sum of \$1500 to be put at interest by my executors, and the interest added to the principal from time to time, or the interest put at interest; and the one-half of said sum, with one-half of the interest which may have accrued when my granddaughter, Mary Louisa Cook, arrives at the age of twenty-one years, I order to be paid to her; or, if she dies before that time, leaving issue her surviving, I order her said share to be paid to her child or children; and the remaining half of the said money, with the remainder of the interest, I order to be paid to my grandson, Joseph Cook, when he arrives at the age of twenty-one years; but if he dies before he arrives at the age aforesaid, leaving issue, I order his said share to be paid to his child or children; and if either the said Mary Louisa or the said Joseph die before arriving at the age aforesaid, and without leaving issue, then I give the whole of the said sum and interest to the survivor of them; or if one of them die before arriving of age, and leave issue, and the other die before arriving of age, and without issue him or her surviving, then I give the whole of said moneys to the child or children of the one so dying and leaving issue."

---

Ware v. Ex'rs of Cook.

---

"12th. All the residue of my estate, after the payment of my debts and expenses, and the legacies herein before devised, I give to my grandchildren Sarah Richman, Mary Louisa Cook, Joseph Cook, and Mary Cook, to be equally divided between them, each one to receive his or her share thereof, as him or her attains the age of twenty-one years; and if any one of them dies before him or her attains the age of twenty-one years, leaving issue him or her surviving, then to the issue of him or her so dying, I give the share which the parent or parents of such issue would have been entitled to under this devise; but if any one or more of my said grandchildren die before attaining the age of twenty-one years, and without issue surviving him or her, then I give his or her share of this devise to the survivors and to the issue of him or her dying leaving issue, the issue of any one to have the same the parent of such child would have been entitled to under the devise."

That, on or about the 7th of January, 1841, the executors proved the will, and by virtue thereof possessed themselves of all the estate that was of the testatrix, amounting to \$10,000 and upwards. That, on or about June 9th, 1842, the said Mary Louisa Cook was married to Richard M. Ware; that the said Mary Louisa afterwards, on or about March 4th, 1844, died, not having yet attained the age of twenty-one years, leaving the complainant, her son and only child, her surviving, who is an infant of about ten months old. The bill is filed by the infant, by his guardian, Richard M. Ware, his father, and prays that the executors may pay the one-half of the said \$1500, and of the interest that has accrued thereon, and also the one-fourth part of the residue of the estate, together with the interest that has accrued thereon.

To this bill a general demurrer was filed July 10th, 1844.

*Mr. Jeffers*, in support of the demurrer, contended, First, that, under the provisions of this will, after the death of Mary Louisa Cook under twenty-one years, no interest could ever vest in the complainant. Second, that, by the will, the money was not payable until the time at which Mary Louisa Cook would have attained twenty-one years of age, if she had lived, and that the bill does not show that the time had arrived.

---

Ware v. Ex'rs of Cook.

---

He cited 3 *Atkyns* 101, 102, 114, 427, 428; 3 *Vesey* 10, 12.

*P. D. Vroom, contra*, cited 3 *Atk.* 645; 2 *Brown's Ch. R.* 4, 305; 2 *Meriv.* 386; 6 *Vesey* 239; 7 *Ibid.* 421; 1 *Roper on Leg.* 387, 583, 584; 3 *Vesey* 15; *Ambler* 588; 2 *P. W.* 336, 478; 1 *Eq. Ca. Ab.* 299; 2 *Vernon* 94, 199, 283.

THE CHANCELLOR. The bequest made in each of the clauses, gives, I think, a vested interest. The will only postpones the time of payment. But in reference to both clauses there is a gift over to the issue of the legatee dying before twenty-one, leaving issue. The will gives half, with the interest thereon, to one, when she arrives at twenty-one, and half, with the interest thereon, to the other, when he arrives at twenty-one; and provides that if either die under twenty-one, leaving children, the half shall be paid to his or her children; and that if either die under twenty-one, without leaving issue, the other, or the children he or she, if dead, may have left, shall have the whole.

If one die under age leaving children, does this will require us to say that these children shall have nothing unless and until they live to the time when their deceased parent would have attained twenty-one, if he or she had lived? I see nothing in the language of the will, or in the nature of its provisions, requiring or authorizing such a construction.

The demurrer will be overruled.

Order accordingly.



---

Pierson and Gruet v. Ryerson.

---

ELIJAH C. PIERSON AND EDWARD GRUET v. VAN BUREN  
RYERSON.

1. A mortgagor, in 1829, conveyed a part of the mortgaged premises to C. The mortgagee, on the same day, released this part to C, and on the next day assigned the mortgage to D. On a bill filed by D, in 1844, a decree was made for the sale of all the land described in the mortgage. C was made a party defendant with the mortgagor, but did not appear, knowing that D had notice of the release. At the sheriff's sale all the land described in the mortgage was set up and struck off to D, and the sheriff, in pursuance of an arrangement between D and E, made the deed to E. E brought ejectment against C for the part so conveyed and released to him. On a bill filed by C against E, stating these facts, and that D, when he took the assignment of the mortgage, had notice of the release, and that E, before he took the sheriff's deed, had notice of the release, a preliminary injunction was granted restraining E from prosecuting the ejectment.

2. A denial on information and belief of notice to another is not sufficient to dissolve an injunction.

3. The denial of two allegations conjunctively is not a denial of each.

4. A release of a part of mortgaged premises had been recorded. An allegation of the defendant that he never heard of the release till after he bought, *held*, under the circumstances, not to be a sufficient denial of knowledge of the release.

---

The bill states that on the 28th of May, 1828, Richeson Buckbee mortgaged to Aaron Peck the tract of land first described in the bill, to secure \$1700. That on the 28th of April, 1829, Buckbee, with his wife, conveyed a part of the said tract (describing the part,) to the complainant Pierson. That on the same day, Peck, with the knowledge and consent of Buckbee, released from the lien of the mortgage the part so conveyed by Buckbee and wife to Pierson. That on the 29th of April, 1829, and after the making of the release, Peck transferred the mortgage to Charles R. Akers, with full notice to him of the said release. That the conveyance by Buckbee and wife to Pierson, and the release from Peck to Pierson, were recorded April 30th, 1829. That the part conveyed by Buckbee and wife to Pierson was conveyed to Pierson in trust for Peck, though the deed was absolute in terms, the consideration of the conveyance to Pier-

---

Pierson and Gruet v. Ryerson.

---

son having been paid by Peck ; and that Pierson never paid or assumed to pay any consideration for the said release. That Peck, having such interest in the part released, and supposing he had a right to convey it, did, by deeds executed by him and his wife, convey the part so released, in divers parcels, to divers persons, in the year 1829. That under said conveyances and divers mesne conveyances subsequent thereto, the complainant Pierson, on the 4th of February, 1835, became and is now seized in fee, in his own right, of a part of the released premises, (describing the part,) and the complainant Gruet, on the 22d of July, 1843, became and is now seized in fee, in his own right, of another part of the released premises, (describing the part.) That in order to remove any doubt or embarrassment as to the title of Gruet, and to carry out the intention of Peck, Pierson, at the request of Gruet, and with the concurrence of Peck, on the 13th of June, 1845, executed and delivered to Gruet a deed, of that date, conveying to him the part of the released premises which had been conveyed to him as aforesaid. That on the 28th of April, 1829, after the conveyance and release aforesaid, Buckbee and his wife, further to secure the moneys mentioned in the said mortgage, made and delivered to Peck another mortgage of another lot of one acre and forty-eight hundredths. That on the 8th of November, 1830, Buckbee and wife made and delivered to Pierson a mortgage of a tract of three acres, to secure the payment of \$750, with interest, on a note given by Buckbee to Pierson ; this last tract embracing the lot described in the last-mentioned mortgage from Buckbee and wife and a part of so much of the tract first described in the bill as lies west of Mechanic street in Orange. That on the 8th of April, Pierson assigned to Akers the mortgage and note so made by Buckbee to him. That after the said conveyance and release to Pierson, and immediately thereupon, Pierson, with the concurrence of Peck, laid out and dedicated to public use as a street, a strip of land, part of said released premises, extending the whole depth thereof from the road leading through Orange to Newark, and occupying the westerly side of said released premises, in width fifty feet ; and that Peck thereupon conveyed the lot of which Gruet is so seized, as binding on the said street called Mechanic street, so laid

---

Pierson and Gruet v. Ryerson.

---

out as aforesaid ; which street has been enjoyed by the public from about April 28th, 1829, to this time, without interruption or dispute, though it has never been regularly laid out according to law by surveyors of the highways. That Ryerson, the defendant, threatens and intends to take possession of the said strip so dedicated for a street, or to convey it or bring ejectment for it, so as to deprive the complainants of their rights therein and of the use thereof. That on the 3d of January, 1844, Akers filed his bill to foreclose the said mortgage ; that before doing so, he repeatedly stated to Peck and the complainants, or some of them, that he had no claim upon or interest in the land so conveyed and released to Pierson, and that it was fully released from the mortgage. That Akers' said bill, through inadvertence or otherwise, omitted to state or admit the said release. That Pierson was made a defendant in said suit, but Gruet was not. That Pierson, knowing of the release and that Akers had knowledge of it and notice of it as aforesaid, and having confidence that Akers would not ask a decree for the sale of the part so released, and being a proper party defendant in the foreclosure suit for reasons other than his interest in the said released part, did not appear to the said suit. That a decree *pro confesso* was taken for the sale of all the lands originally embraced in the said mortgage from Buckee and wife to Peck. That the sheriff of Essex, by virtue of an execution issued on said decree, advertised all the said lands, and on or about the 1st of August, 1844, struck off the same to Buckbee. That Buckbee, being subsequently advised that the taking a deed to him under that decree and sale would not defeat the rights of the complainants in this bill in the parts released, inasmuch as he had conveyed that part to Pierson as aforesaid, an arrangement was made, or it so transpired, that the lands were again advertised by the sheriff under the said execution, and on or about the 23d of December, 1844, were again sold, and at this sale were struck off to Akers. That afterwards, on or about the 10th of January, 1845, in pursuance of some arrangement made by and between Akers and the defendant, the sheriff executed and delivered a deed therefor to the defendant, which, though it may bear date the said 10th of January, 1845, was not actually delivered till about the 10th of March,



---

Pierson and Gruet v. Ryerson.

---

1845. That immediately on being informed that the decree embraced the part released, and that execution was issued thereon and a sale was advertised, the complainants in this bill, or some person in their behalf, applied to Akers and remonstrated with him against his proceeding to sell the part released ; and that thereupon Akers expressly disclaimed any right or interest in the part released, and any intention or expectation of disturbing the complainants in respect to the same, by reason of the said decree and execution, or any sale by virtue thereof. That the complainants, confiding in his said assurances, and in the belief that he would so arrange the sale as not to disturb or disquiet them, took no measures to interrupt or prevent any proceeding of Akers under his said decree and execution. That before the said sheriff's sale to Buckbee, and before the said sheriff's sale to Akers, and before the said conveyance from the sheriff to the defendant, and before any consideration therefor was paid by the defendant, the defendant was informed and well knew of the said release, and of its having been made before Akers acquired his interest in the mortgage ; and that before the said sheriff's sale to Akers, the defendant was fully informed by Akers that he, Akers, had no interest in or claim to the part released ; that the same had been released ; that the decree ought not to have been taken for the sale of that part, and was in that respect erroneous, and that he must take the deed from the sheriff, subject to the rights of the complainants in the part so released. That in the said arrangement between Akers and the defendant, no part of the consideration money for the conveyance to the defendant was computed or allowed upon or as an estimated value of the part released, and that no consideration was paid, or secured to be paid, by the defendant therefor. That before the sheriff's deed to the defendant was delivered as such to him, the complainants, or some person in their behalf, notified him of the said release, and that the said decree and execution were erroneous in directing a sale thereof. That Ryerson, the defendant, had brought ejectments against the complainants, Pierson and Gruet, to recover possession of the parts they respectively hold of the said released premises.

The prayer of the bill is that the defendant be perpetually enjoined from prosecuting the said ejectments, and from com-

---

---

Pierson and Gruet v. Ryerson.

---

menacing any other proceedings at law for the recovery of the possession of the part released, and from conveying the same.

A preliminary injunction was granted.

Ryerson put in an answer to the bill, in which, among other things not necessary to be stated, he says that, answering from the best of his knowledge, information and belief, but not admitting its due execution or acknowledgment, he admits the release, and that it was recorded as stated in the bill; and says that he can answer as to the knowledge of Akers of the release at the time of the assignment of the mortgage, only from information derived from Akers and others, and that from such information, he believes that Akers was then wholly ignorant of the release; and admits the property was struck off to Akers at the sheriff's sale, and says that Akers bid at his request, and as his agent; and that, on the 10th of January, 1845, he paid \$1100 of the purchase money, and the balance, to wit, \$1800, on or about January 29th, 1845, at which time the deed was delivered to him by the sheriff; and denies that, at the time he bought at the sheriff's sale as aforesaid, he knew or had any information whatever, that the part alleged to have been conveyed and released to Pierson had been so released; and that Akers had no claim, right, title or interest therein by virtue of his mortgage, but says he made the purchase under the belief that he was buying said lands free and clear of all encumbrances whatever, and without any knowledge of the pretended claims now set up by Pierson and Gruet, and without any knowledge of the encumbrances set forth in the bill, relating to the execution of the said pretended release, and without any such notice or information from Akers as is alleged in the bill; and says that the first time he ever heard of the release mentioned, was on the 8th of March, 1845, after he had paid all the purchase money, and received his deed as aforesaid. He says it may be true, though he has no knowledge of the fact, that after the decree the complainants, or one of them, called on Akers and remonstrated with him, as stated in the bill; and that Akers had no knowledge that the bill of complaint prayed a sale of all the land mentioned in the mortgage. He denies that any arrangement was made between Akers and him respecting the purchase of the said land and premises, except that Akers

---

Pierson and Gruet v. Ryerson.

---

should buy at the sale as his agent; and he more particularly denies that any arrangement was made between them by which no part of the consideration of the said conveyance to him was computed or allowed upon or as an estimated value of the tract so released, as stated, or that the same or any part of it was excluded in whole or in part, by any arrangement, from the computation or estimation of such consideration money; and he denies that no consideration money was paid or secured for or on account of the same, but says that the money paid by him was paid and intended to be paid, as much as a consideration for that part as for any other part. He denies that before the conveyance of the sheriff to him, the complainants, or any other person or persons on their or either of their behalf, or in any other way, notified him of the said pretended release, or that by reason thereof the mortgage was no longer a lien on the same, or that the decree and execution were erroneous as directing the sale of the same, or that the complainants held any part of said lands free and clear of the said mortgage; and he alleges he never heard of any such release till after he had paid for the land and received his deed therefor.

On this answer a motion was made to dissolve the injunction.

*A. Gifford and B. Williamson*, in support of the motion. They cited 4 *John. Ch. Rep.* 202; 5 *Ibid.* 69.

*A. C. M. Pennington and A. Whitehead*, contra. They cited 2 *Vesey* 19; 1 *Paige's Ch. Rep.* 100; *Dev. Eq.* 429; *Hopkins*, 148; 5 *John. Chan. Rep.* 247; *Wyatt's Prac. Reg.* 19.

THE CHANCELLOR. The answer is insufficient to dissolve the injunction. So far as the equity of the bill rests on the allegation that Akers, before he took the assignment of the mortgage, had notice of the release, there is no sufficient denial. The answer to this allegation is, that the defendant, from information derived from Akers and others, believes that Akers was then wholly ignorant of the release. A denial on information and belief, of notice to another, is not sufficient to dissolve an injunction.



---

Pierson and Gruet v. Ryerson.

---

So far as the equity of the bill rests on the allegation that, before the sale at which the property was struck off to Akers, and before the defendant took the deed, he knew of the release, there is no sufficient denial. The bill further charges that before, &c., the defendant was informed by Akers, that he, Akers, had no interest in or claim to the part released. The defendant, in answer, says that Akers bid at the said sale at his request and as his agent, and denies that at the time he bought at the sheriff's sale, as aforesaid, he knew or had any information whatever, that the part alleged to have been conveyed and released to Pierson had been so released, and that Akers had no claim, right or interest therein by virtue of his mortgage, but says he made the purchase under the belief that he was buying the lands free and clear of all encumbrances, and without any knowledge of the pretended claims now set up by Pierson and Gruet, and without any knowledge of the encumbrances set forth in the bill relating to the execution of the said pretended release, and without any such notice or information from Akers as is alleged in the bill. A denial that he knew of the release *and* that Akers had no right or interest in the part released, is not a denial of knowledge of the release. The defendant may have been of opinion that Akers had a right or interest in the part released, by virtue of the mortgage and the decree thereon, notwithstanding the release. The denial of two allegations conjunctively, is not a denial of each. Again, all this part of the answer relates to the time when he (as he says) bought at the sheriff's sale, as aforesaid. What time is meant here? The time when the property was struck off to Akers, or the time when he took the deed from the sheriff?

The defendant has used two general sentences in his answer by way of denial of knowledge of the release. In one of them he says that the first time he ever *heard* of the release *mentioned*, was on the 8th of March, 1845, after he had paid the purchase money and received his deed. In the other he says he never *heard* of any such release till after he had paid for the land and received his deed therefor. General denials are always unsatisfactory. It is said, "*Dolus latet in generalibus.*"

In this case the release was recorded, and the defendant admits it was recorded as stated in the bill. This may account

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

for the language used in these general sentences. They do not, under the circumstances, and in view of the failure in the more special answer to this charge, amount to a denial of knowledge of the release.

It would be unsafe for the court to suppose and act upon the supposition, that a want of observance of plain rules for answering is the result of inattention, or want of skill, or want of precision of language. It may proceed from an unwillingness to disclose the truth.

The motion is denied.

---

THE MORRIS CANAL AND BANKING COMPANY v. THE SOCIETY  
FOR ESTABLISHING USEFUL MANUFACTURES.

1. The Society for Establishing Useful Manufactures, incorporated in 1791, located at the falls of the Passaic, and owning mill sites there, on the 8th of August, 1845, pulled down a gate and waste-way of the canal of the Morris Canal and Banking Company, incorporated in 1824, and discharged the water from the canal into the Passaic above the falls. The canal company repaired the breach, and filed their bill against the society for an injunction, which was granted.

2. The society answered the bill, and set up an agreement under seal, entered into between the canal company and them in 1836, for the discharge of water from the canal into the stream above the falls, and stated that the canal company, in breach of the contract, had nailed down the gates of the waste-way and stopped the flow of water from the canal to the river; and that therefore they broke, &c.; and thereupon it was moved to dissolve the injunction. The motion was denied.

3. The society also filed a cross-bill, praying a decree for the specific performance of the agreement, and that the canal company might, in the meantime, be restrained from preventing the flow of water from the canal to the stream, according to the provisions of the agreement, and moved for an injunction accordingly. This motion was also denied.

4. Grounds on which the motions were denied.

5. A right claimed must be free from doubt, and the injury from a violation of it irreparable in damages, to authorize the court to interpose in aid of it by preliminary injunction.

---

The Morris Canal and Banking Company, on the 3d of October, 1845, exhibited their bill against the Society for Estab-

---

**Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures**

---

lishing Useful Manufactures, stating that since April 1st, 1845, the said company have been engaged in widening and repairing their canal, and having completed the work, proceeded, early in July, to fill the canal with water, and that, thereupon, Roswell L. Colt, governor of the Society for Establishing Useful Manufactures, under pretence that the company were using water to fill their canal which of right belonged to the society, which allegation and pretence the complainants declare to be untrue, on or about the 18th of July last, declared his intention to break down the gates of the complainants' canal; that the process of the law was too tedious, and that he would take the law into his own hands; and made many violent declarations and threats, all expressive of the same intent. That on the 8th of August, aforesaid, the canal being filled and ready for business, the complainants gave public notice that the same was ready for business. That on the last-mentioned day, a party of men of ten or twelve, of Paterson, the location of the society, in a violent and riotous manner, broke down a gate and waste-way on the canal, at or opposite Paterson, so that the water in the canal was discharged therefrom for a distance of seven miles. That the leader of the party declared he was employed so to do by the society, and when remonstrated with by the agent of the complainants, threatened to shoot any person who should interpose to prevent him. And the complainants charge that the said party were employed and directed to demolish said gate and waste-way by the said society, or by R. L. Colt, acting or pretending to act under the authority of the society.

That the complainants gave directions for the immediate repair of the breach, and had no doubt the same had been repaired, and that the part of the canal which had been so emptied was in the course of being filled again, and that the same would be again ready for business in a few days, if no further violence was done to the canal or its works. That at the time of the said demolition they had seventy-five boats between Newark and Paterson, proceeding to Mauch Chunk for coal, and that the said boats were stopped by reason of said breach, and that there were at the time many other boats of the company and of individuals about to be put on the canal.



---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

That, by the act of incorporation of the company, the canal is declared to be a public highway. That the canal, if unmo-  
lested, will have capacity to transport about 300,000 tons of  
coal and merchandise annually. That, in contemplation of the  
increased capacity of the canal when widened, several large  
establishments have been put up on the line of the canal; that  
other establishments on the line, and inhabitants of villages,  
would be injured by the interruption of the navigation on said  
canal. That the company have in no way infringed any right  
of the society touching the use of the waters of the Passaic,  
but charge the truth to be that, from the time they commenced  
filling the canal to the time of the said injury to the canal, more  
water was running in the Passaic above the falls than before  
the complainants commenced filling their canal, by reason of  
the leakage from the canal, and by the water flowing from the  
complainants' reservoir at Long Pond into the Passaic through  
the Pompton. That, at the time of said breaking, water was  
actually running over a dam across the Passaic, above the falls  
erected by the society for the express purpose of diverting the  
waters of the Passaic for the use of the society and mill-owners;  
so that there was actually running in the Passaic, at the time,  
more water than the society could divert to their works.

That the complainants have sustained great and irreparable  
injury and damages by the said breach and the interruption of  
their business; and that they apprehend, from the facts above  
stated, that other like injuries will be committed, and that the  
said society, or the said Colt, or some person or persons acting  
under the authority of them, or some of them, will again break  
down or destroy, &c.; and they pray an injunction against the  
society and the said Colt, restraining them from breaking down  
or injuring any of the works of the canal, until the further order  
of this court to the contrary.

An injunction was granted according to the prayer of the  
bill.

The society put in an answer to the bill. They state the  
incorporation of the society in 1791, the purchase of 700 acres  
of land at the great falls of the Passaic, the construction of a  
canal from a short distance above the falls, to lead the water  
through the lands bought by them and empty it into the river

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

below the falls, and the construction, at different periods, of two other canals, so that the water is now used three times. That the ground adjacent to the canals forms sites for mills, and that the society, finding that their manufacturing business could be carried on more advantageously and effectively through individual enterprise, have in a few instances sold, and in general leased, on reservation to the society of annual rents, a great number of lots, as sites, on which have been erected a number of mills, which are now in full operation, and have leased or sold water-power on the upper canal to the amount of twenty-one square feet of water, on the middle canal of twenty-one and a half square feet, and on the lower canal of twenty-two square feet. That the lots already appropriated, with the buildings and machinery thereon, are worth about \$1,800,000. That said canals, improvements, and leases have all been made and taken, under the confident expectation that the faith of the state would be kept inviolate, and that the waters of the Passaic would be allowed to continue to flow, &c. That Paterson, incorporated under the said charter, now contains 11,000 inhabitants. That the society, by such purchase, &c., became entitled to the full flow of all the waters of the Passaic and its tributaries, without alteration or diminution. That the Passaic is formed by the confluence of three large branches—the Passaic, Rockaway, and Pompton branches. That the complainants, in 1828, constructed works on the Rockaway, near Dover, Powerville, and Boonton, by means whereof they diverted water of the Rockaway and its tributaries into their canal, and carried it away from the falls at Paterson and from the canals of the society there. That, by means of the said works at Dover, Powerville, and Boonton, the complainants can take from the Rockaway as much water as they want, to supply their canal, without the knowledge of any person except their own agents. That, in consequence of dams, &c., on the streams, the diminution of water in the Passaic, from the withdrawal of it as aforesaid, will not be immediately seen and felt in some parts of the river, which gives rise to contradictory evidence respecting such diminution, and involves it in obscurity. That the canal of the complainants cuts off a great number of small streams which formerly ran into the different branches of the Passaic. That

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

in 1828, the society filed their bill in chancery, to enjoin the said company, and that the Chancellor decreed that the society have a clear right to the flow of all the waters of the Passaic, at the great falls, without diminution, and that an injunction would be ordered when an actual injury should be sustained by the society, by the said company's taking any of the waters of the Passaic. That in 1833, the society filed another bill, in which the Chancellor made a like decision as to the rights of the society. That there was no necessity for the said canal company to mix their waters with the waters of the Rockaway, and that they did so for the purpose of taking the waters of the Passaic or its tributaries, into their canal. That the works at Paterson will require all the waters of the Passaic, during the summer months, and that if the canal company are permitted so to divert the waters, without giving the society the water in return, as provided for in the agreement in the answer after mentioned, they will, during the summer months—more especially in dry seasons—divert a great portion of the water from the works at Paterson, and will greatly injure them at other seasons of the year. That in January and February, 1836, the canal company applied to the legislature for a supplement to their charter, to enable them to make a reservoir at Long Pond and a feeder at Pompton, to use the water of the canal for manufacturing purposes, to increase the capital stock \$600,000, for the purpose of making reservoirs, feeders, &c.; that the society and mill owners remonstrated; and, while said application was pending, and after a time had been fixed for the hearing of the parties before a committee of the legislature, to settle the difficulties between the company and the society, and because the conflict between them was so important, and affected so many persons, and to compromise disputed rights appertaining to the franchises of the two companies then in the enjoyment of those franchises, it was, on the 17th of February, 1836, agreed between the companies, in writing, as follows:

“Whereas certain controversies have arisen, and have for some time existed between ‘The Society for Establishing Useful Manufactures’ and ‘The Morris Canal and Banking Company,’ in relation to the use of the waters of the Passaic river, ‘The Society for Establishing Useful Manufactures’ alleging



---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

that 'The Morris Canal and Banking Company' were diverting the water of some of the tributary streams of the Passaic, so as greatly to diminish the waters at Paterson, in times of drought, of which the said 'Society for Establishing Useful Manufactures' claim the exclusive use—which allegation was and is denied by 'The Morris Canal and Banking Company;' now, in order to terminate in an amicable manner all said matters in difference between the said companies, it is covenanted and agreed between them as follows:

"First. The said 'Society for Establishing Useful Manufactures' covenant and agree, to and with 'The Morris Canal and Banking Company,' that they will erect, at their own expense, a permanent, water-tight dam, and at all times will keep the same water tight (unavoidable accidents excepted), across the Passaic river, at the ledge of rocks between their present dam and the great falls; said dam to be of such height as will keep the water at a level equal to that which can be maintained by the present dam, and that they will make and keep their present middle canal or raceway in good order and repair, and water tight, and so adjust the waste-gates on the same that the water shall stand in the said raceway not less than thirty inches above the monument set in the raceway at the rear of Carrick's mill, that being the ordinary height of the water in said race. That they will so regulate the sluices or gates to the mills on that race, that not more than twenty-two square feet of water shall be drawn from the same under a pressure or head of not more than thirty inches, measured from the centre of the apertures to the surface of the water; the apertures already contracted for to be twelve inches square, excepting where, under existing agreements, it is stipulated that they shall be of a different form, and those thereafter to be contracted for to be not less than six inches in depth; it being expressly understood that, in this arrangement, it is agreed that a quantity equal to twenty-two square feet of water, drawn under a head of thirty inches, measured as aforesaid, is the minimum quantity of water to flow regularly for the supply of the mills now erected, or hereafter to be erected at Paterson, to be measured on said middle canal in manner aforesaid. And the said 'The Society for Establishing Useful Manufactures,' in consideration of the

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

covenant hereinafter and first contained, on the part of 'The Morris Canal and Banking Company,' do hereby consent and agree, so far as they have the power so to do, that the said 'Morris Canal and Banking Company' may make and avail themselves of all reservoirs on the head waters of any of the tributary streams of the Passaic river, and divert those streams, and use the waters thereof as they may think proper.

"And the said 'The Morris Canal and Banking Company' do hereby covenant and agree to and with the said 'The Society for Establishing Useful Manufactures,' that they will discharge from their canal, through a basin formed by 'The Society for Establishing Useful Manufactures,' and by them kept in repair and water-tight, in the natural ravine on the rocky hill adjoining the canal, near the falls, at all times, unless when, from breaches, or unavoidable accidents, it cannot be done, three square feet of water, to be drawn from the canal under a head of thirty inches, to be measured from the centre of the aperture or apertures to the surface of the water, and to flow into the said Passaic river above the said dam, to be erected by the said 'The Society for Establishing Useful Manufactures,' as is hereinbefore provided for; which apertures shall not be less than eight inches in depth. And if the said three feet of water, so drawn as aforesaid from the said canal, shall not at any time, with the water in said river, be sufficient to keep the pond so full as may be necessary to give to the said 'The Society for Establishing Useful Manufactures' twenty-two square feet of water in their said middle canal, to be drawn under the pressure above mentioned, then 'The Morris Canal and Banking Company' covenant and agree to discharge as much more water from their said canal, in addition to the three feet above mentioned, as shall always give the above minimum quantity in the said middle canal of the said 'The Society for Establishing Useful Manufactures.' And in case, at any time, the said dam and raceway of 'The Society for Establishing Useful Manufactures' shall not be water-tight, for any reason whatever, the said 'Morris Canal and Banking Company' shall not, during the time the same remains out of repair, be obliged to discharge more than three feet of water from the canal, in the manner herein mentioned. And 'The Morris Canal and Bank-

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

ing Company' hereby agree that if they shall hereafter be satisfied by experience, that in dry seasons the natural supply of water in the Passaic, at Paterson, shall be equal to twenty-three feet under the pressure and head hereinbefore mentioned, then the minimum of water to be secured to the works of 'The Society for Establishing Useful Manufactures,' at Paterson, shall be fixed at that quantity.

" 'The Society for Establishing Useful Manufactures' hereby covenant and agree that 'The Morris Canal and Banking Company,' for the purpose of forming a reservoir in the Passaic river, at and above the falls, may, at their own expense, increase the height of the main dam across the said river, provided, however, that the said 'The Morris Canal and Banking Company' shall pay and satisfy any damages which may be sustained by any person or persons other than the said 'The Society for Establishing Useful Manufactures,' in consequence of the erection of the said dam.

" For the purpose of having this arrangement fairly and properly executed by the respective parties, it is hereby further agreed that a competent person be annually appointed by the parties, and be paid by them equally, whose duty it shall be to see that the terms of this agreement are complied with by the respective parties. And in case the parties cannot agree upon the person to be appointed, then it is agreed that each party will nominate an arbitrator, and the two arbitrators so named shall appoint the said person; and if they cannot agree, then they shall nominate a third arbitrator, and the said three arbitrators, or any two of them, shall appoint the said person to see that this agreement is properly and fairly executed.

" It is understood between the parties hereto, that this agreement is not binding upon them, unless the legislature of the State of New Jersey shall pass an act at their present session, enabling and authorizing 'The Morris Canal and Banking Company' to use, or let to others to use, the waters in their canal, for driving machinery for manufacturing purposes, and also authorizing them to make a feeder to Long Pond, and to acquire and make other reservoirs, for the purpose of obtaining a supply of water for the use of said canal; and to increase their capital to an amount sufficient to acquire, and make the



---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

necessary reservoirs and feeders, or shall grant such part or parts of their application as shall induce 'The Morris Canal and Banking Company' to make the contemplated improvements, for the use of the waters of the Passaic, or any of its tributaries.

"In witness whereof, the president of 'The Morris Canal and Banking Company,' and the governor of 'The Society for Establishing Useful Manufactures,' have hereunto set their respective hands, the seventeenth day of February, in the year of our Lord one thousand eight hundred and thirty-six.

"LOUIS McLANE,

"President of the Morris Canal and Banking Company.

," ROSWELL L. COLT, Governor S. U. M.

"Signed, sealed and delivered in the presence of }  
A. S. PENNINGTON, ELIAS B. D. OGDEN."

That the said agreement was signed by the then president of the canal company, and by R. L. Colt, governor of the society; and that said president was clothed with full power to make said agreement by a resolution, &c. That said agreement was entered into in good faith by the society, and they thereupon considered that all controversies with the said company were at an end. That in pursuance of the said agreement, the society built, at great expense, a dam across the river, and also at the place referred to in said agreement; and built a lock at the place and in the mode pointed out by the engineer of the canal company, to take the water from the said canal, according to the terms of the said agreement. That the canal company took down their bank across a ravine, cleared out the ravine, and surrendered the possession of it to the society; and the same continued open and was used by the society until it was obstructed by the company, as after stated in the answer. That after the execution of the said agreement, the society and others withdrew their opposition and assisted, &c., and the said supplement applied for by the said company was passed by the legislature, March 5th, 1836.

The answer insists that this act, and the acceptance of it, effected a change in the chartered rights of the canal company, investing them with additional powers; and that such change being made by virtue of the said agreement with the

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

society, and in consequence of the withdrawal of their opposition, the agreement became a part of the same transaction, as much as if it had been distinctly referred to in the said supplement, and was thereby fastened on the franchises of the canal company, in whose hands soever they might fall ; and that the rights of the society under the said agreement became a lien on the franchises and privileges of the canal company, so far forth as should be necessary to carry the same into full effect.

That under the said supplement the canal company increased their capital and made a large reservoir at Long Pond, and a feeder to their canal, and by one or more dams took into their canal the waters of the Pompton and its tributaries, so that they could then take into their canal, in a dry season, if they chose to do so, all the waters of the Pompton and Rockaway, leaving the defendants without any remedy, except by reason of the said agreement. That Cornelius S. Van Wagoner was appointed by the companies their joint agent, to see that the terms of the said agreement should be complied with ; and the said two companies executed a commission to him, dated February 6th, 1839, as follows : (Setting out the commission. It is an appointment for one year, to see that the agreement is complied with.) That since the passage of the supplement, the company have exercised the powers granted by it and by the said agreement. That said Van Wagoner did, from time to time, draw from the canal such water as was required by the society, not exceeding the quantity stipulated to be drawn by said agreement, for the use of the society ; and that the society have, ever since that agreement, taken from said canal such water as they wanted, according to the said agreement, until prevented, as after stated. That the society now own the said ravine. That the company commenced, last spring, to enlarge their canal, and that the society have been prevented from interfering to prevent it by reason of their being bound by the said agreement.

That on the 17th of June last, (1845,) the company erected a wall and wood-work so as to prevent any water from flowing from the canal into the Passaic, or basin above the falls, and placed gates in the same, which they nailed up, so that the society could not take the water from the canal, as provided for

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

in the said agreement, at the place so cleared out and surrendered to the society, in part performance of the said agreement, though forbidden by the society from erecting said wall and wood work. That, after the said erections, the works at Paterson became short of water ; that, at sometimes, there would be plenty of water, and at other times a scarcity ; and that, on the first of August last, the company drew into their canal nine-tenths of all the waters of the Pompton, by their said feeder, and, at the same time, took a considerable part of the Rockaway or its tributaries ; so that some of the mills at Paterson could not run all their machinery. That the society, seeing that the water was low at Paterson, by reason of the conduct of the company, on the 21st of July last, addressed a letter to the company as follows : (The letter is here given. It states that, by the contract, the society is entitled to a constant flow from the canal of three square feet, under a pressure of thirty inches, and also to draw from the canal enough water to supply twenty-two feet, at all times, in the middle canal of the society at Paterson, and that the society can view the said wall and wood work to close said waste-way in no other light than as a nuisance, which they will treat accordingly, unless the company immediately furnish them with their water, according to said agreement, as the water is now very short.) That they received, the same day, an answer from the cashier of the company, that the president was absent, and that on his return the letter of the society would receive immediate attention ; and that since then the society have not heard from the company in relation to it ; and the society, finding the waters of the Passaic, after sending said letter, rapidly diminishing, and complaints being made by the mill-owners, grantees or lessees of the society, of the scarcity of water, and that they could only run a part of their machinery ; and the society having ascertained that the company were drawing a great deal of water from the Pompton and Rockaway, and their tributaries, while at the same time they had shut off all supplies to the works at Paterson, the society were compelled, to prevent irreparable injury to the mills and inhabitants of Paterson, to remove said wall and wood-work, and to treat the same as a nuisance ; and they admit that, on the 8th of August, 1845, they did remove



---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

so much thereof as would permit the water to flow as it had been accustomed to flow through the said ravine, from the time the said lock-gate was erected until the said wall and wood-work were erected. They admit that said Dickerson and others were employed by them to remove the same. They say that, for several days before the breaking down the said wall, the water had been very low at Paterson, occasioned by the company's diverting and using the waters of the Passaic, and not returning any through the said ravine. That sometimes there would be plenty of water, and then again a scarcity, without any cause except the will of the company, who let the waters come down irregularly. That it may have been that, at the particular time when the wall was removed, there was water at Paterson; but if there was, it was only a temporary matter; and that, at that time, the said ravine was closed by the act of the company, so that no water could run to the works at Paterson through the same; whereas, by the said agreement, the society were entitled at all times to have three square feet of water running through the said ravine; and that this right did not depend on the quantity of water in the river.

On this answer, a motion was made to dissolve the injunction.

The society also filed a cross-bill, stating the matters set forth in their answer, and stating, in addition thereto, that the commissioners appointed by the legislature, previous to the granting of the canal charter, to examine, &c., contemplated that Lake Hopatcong would be an ample supply for the said canal, and recommended its subserviency to that object; that Green Pond is a small lake, whose waters are carried by Meadow Brook into the Rockaway; and that it was not contemplated by the said commissioners, or recommended, that its waters, or any waters contributing to the Passaic, should be applied to the purposes of the said canal. That one inducement for selecting Paterson as the site of the society's operations, was the consideration that Green Pond might be converted into a reservoir to supply, in some measure, the deficiency of water occasioned by the droughts of the summer months. That the canal company, in March, 1830, executed a mortgage to Wilhelm Willink on the canal and chartered rights of the compa-

---

*Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.*

---

ny to secure \$750,000, and have since executed one or more mortgages to the State of Indiana and to the State of Michigan. That after the making of the said agreement between the company and the society, and while the company were enjoying the benefits thereof, Willink filed his bill against the canal company, on the 20th of October, 1841, to foreclose his mortgage; but that the Society were not made parties to the bill. That under a decree and execution in that suit, the canal, the feeder and its appendages, and the chartered rights of the canal company were, on the 1st of October, 1844, sold to B. Williamson, A. Whitehead and J. J. Bryant, and conveyed to them. That the society did, on the day and at the place of sale, and before the sale, publicly give notice of the said agreement to all persons who might bid at the said sale. That the persons now holding the said property and franchises claim to represent, or to be, the Morris Canal and Banking Company, and as such are organized under the said supplement of 1836. That the Morris Canal and Banking Company, thus organized, have lately widened and deepened their canal, and will, by reason thereof, be obliged to take more water from the Passaic or its tributaries; and that the society have been prevented from interfering to prevent such alterations by reason of their being bound by the said agreement.

That about June 17th, 1845, the company constructed the said wall and wood-work on land of the said society, on the line of the said canal, and fixed gates in the same, which they afterwards nailed up, so that the society could not receive the discharge of water from the canal, as provided for in the said agreement. That the place where they so erected the said work was previously, and ever since the same was first cleared out by them under the said agreement, left open and unobstructed by the canal company, in part performance of the said agreement; and that the canal company never had attempted to place any obstructions or erections there, nor had claimed any right so to do, until, &c. That while the said company were erecting the said wall and wood-work, the society forbid them and notified them that they had no right to erect them. That while the company were filling their canal, the works at Paterson have been short of water, and that the

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

company have taken the waters of the Rockaway and its tributaries, and also the waters of the Pompton and its tributaries, as they are authorized by the said agreement and the said supplement to do, to fill their canal ; and in a dry season they cannot carry on their operations on the said canal without using the waters of the Passaic or its tributaries ; and that they have and now do greatly diminish the flow of water at Paterson.

The cross-bill then states the letter to the company, &c., as stated in their answer to the bill of the company, and that the company, since the date of the letter, have continued to draw from the Rockaway and its tributaries and from the Pompton ; and at some times have drawn nearly all the water of the Pompton. That on the 1st of August, 1845, they drew nine-tenths of the water of the Pompton into the canal through their said feeder, and have thereby so affected the water of the Passaic, that many of the mill owners and lessees of the society have not been able to drive all their machinery. That the society, finding that the company were diverting the waters of the Passaic, and that the water, from time to time, in different parts of different days, was so low as not to allow the mills to run at their usual and accustomed speed, removed a part of the said wall and wood-work on the 8th of August, 1845, so as to permit the water of the canal to flow to the Passaic above the falls, as it had been accustomed to flow under the said agreement, and until, &c.

That afterwards, on the 16th of August, 1845, the canal company erected, on lands of the society, in the said ravine, a solid stone wall, of the width of ten feet, extending to the face or exterior line of the canal, so that no water can flow from the canal to the works at Paterson, and afterwards stopped the gates from their reservoir at Long Pond, so that no water could come from that place ; and on the 18th and 19th of August, and for some days before, diverted all the water of the Pompton into their said feeder and thence into their canal, and nearly all the waters of the Rockaway at Boonton into their canal, and at the same time brought no water down from Long Pond ; by reason whereof, nearly all the mills at Paterson were stopped or could run only a small portion of their machinery ; by which means they diverted about two-thirds of all the water



---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

which should have flowed to the works at Paterson, the right to the flow of which, without diminution, belonged to and still does belong to the society.

That the company, in their bill, have not in any way stated the said agreement between the company and the society, nor the said supplement of March 5th, 1836, under which agreement and act combined the company derive the important powers above set forth; nor have they set forth the fact that the society were in the actual possession and ownership of the said ravine, and the flow of water from the said canal to the works at Paterson, and that the society had been so using and enjoying the same since the said agreement, but have knowingly suppressed the same. That the company have charged tolls on the Pompton feeder, made since the passing of the supplement of 1836, and claim the right to lease the waters of the canal for manufacturing purposes, by virtue of said supplement, and have used the said Pompton feeder and reservoir at Long Pond, and drawn water therefrom, which they only had a right to do by virtue of the said agreement and the said supplement. That said supplement was passed because the society had made the said agreement with the said company, and that in consequence of said agreement, the society withdrew their opposition to the said supplement, and thereupon it was passed. That as the company are enjoying the benefits resulting to them from the said supplement, which was based on the said agreement, they cannot take the benefits resulting from the said agreement, and refuse to be bound by the agreement under which the said supplement passed. That if the said agreement is not binding on the company, they have no right to the benefits resulting from the said supplement, or the privileges granted by it, and must give up their reservoir at Long Pond and their Pompton feeder, and their right to lease water as aforesaid, and must permit all the waters of the Pompton and Rockaway and their tributaries to flow down the Passaic to Paterson, without alteration or diminution. That under these circumstances the society hoped the company would have desisted, &c., or from interfering with the society to prevent them from receiving a discharge of water from the canal into the river, through the said ravine, as provided for by the said agreement.

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

The society insist that, on a sound construction of the charter of the company, they are not authorized by the general expressions it contains to take any of the waters tributary to the Passaic, inasmuch as the same were already appropriated, under the faith of the legislature, to the use of the society.

That the company, by their charter, are prohibited from using any waters and streams, except such as may have been acquired by gift or purchase, without first causing a map and survey thereof, and having the same appraised; yet that the company have taken the waters, as above stated, without complying with any of the prerequisites of their charter; and that no survey, map or appraisement of the land or water taken to make the reservoir at Long Pond, or the Pompton feeder, have been put on record. That the company pretend that the society have no right to abate the said wall and wood-work, because they say the land on which it stands belongs to them, the said company, the same having been appraised by the commissioners appointed under their charter, but the society say that the said land, when so appraised, belonged to R. L. Colt, who then resided in Baltimore, and that no notice was given to him of the said appraisement; and that the amount thereof has never been tendered to him, or to the society, or deposited in the Court of Chancery, and so no title has ever been vested in the company. That the taking lands without the intervention of a jury, is contrary to the constitution of the United States, and of this state. That the society, being the owners of said land, and never having given up or abandoned the possession thereof, had a right to enter and abate the said wall and wood-work, especially as it interfered with and utterly prevented the flow of water to the works at Paterson, as provided for in said agreement. That if the ownership or possession of said land was not in them, yet had they a right, by virtue of the said agreement, to enter upon the same, and to remove the said obstruction to the flow of the water, and to abate the nuisance thereby created.

The cross-bill prays that the said agreement may be established, and that the company, and all persons claiming or acting as such, may be decreed specifically to perform it, and to continue to perform the same; and that the wall already erect-

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

ed may be abated ; and that the company, their agents, &c., be enjoined from again erecting the same, and from closing said ravine, and from doing any act by which the flow of the water from the canal, at the said ravine, to the river above the falls, as provided for in said agreement, and heretofore enjoyed by the society, can be in any way hindered or prevented. And if, in the opinion of the court, the company, from any cause, is not bound by the said agreement, then that they, their agents, &c., be enjoined from diverting any of the waters of the Passaic or its tributaries, and from using the said reservoir at Long Pond, or the waters of said pond, and from taking any of the waters of the Rockaway and Pompton rivers or their tributaries ; and that the company may be decreed to account to the society for damages already done, and for further relief.

On this cross-bill the society moved for an injunction against the company.

Both motions were heard at the same time.

Depositions, taken on both sides, were read on the hearing. Their contents are not noticed in the opinion given on these motions, except so far as they go to show the extent of the diminution of water in the mill-races or canals of the society, and the amount of injury which the canal would suffer, if the agreement between the company and the society calls for a constant flow from the canal of three square feet of water, as is contended for by the society, but which is denied by the company.

*P. D. Vroom* and *George Wood*, in support of the motions. They cited *Eden on Inj.* 141, 142 ; 1 *Brown's Chan. Rep.* 588 ; 10 *Vesey* 193 ; 1 *Nicholson's Railway Cases* 173, 198 ; 1 *Mylne and Craig* 650, 347 ; 3 *Ib.* 782, 783 ; 9 *Simons* 278 ; *Saxton's Ch. Rep.* 694.

*F. T. Frelinghuysen* and *H. W. Green*, *contra*. They cited *Angell on Water-Courses* 29 ; *Saxton* 188 ; 6 *Halst. Rep.* 238 ; 1 *Dickens* 165 ; 2 *Ib.* 600 ; 2 *Swanston* 354 ; 16 *Vesey* 333 ; 4 *Barn. and Cressw.* 792 ; 1 *East* 48 ; 2 *P. Wms.* 306 ; 9 *Barn. and Cressw.* 538 ; 1 *Aikin's Vermont Rep.* 264 ; 2 *Mad. Ch. Rep.* 356 ; *Ambler* 452 ; 3 *Halst.*



---

**Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.**

---

149; 5 *Ib.* 78; 6 *Peters* 738, 739; 11 *Ib.* 544, 550, 639; 4 *Ib.* 560; *Vattel*, Book 1, chap. 20, § 244; *Domat's Civil Law*, Book 1, title 8; 20 *John. Rep.* 735; 2 *Mad. Ch. Rep.* 256, 527; 11 *Mass. Rep.* 19; 2 *Kent's Com.* 278; 13 *Serg. and Rawle* 210; 3 *Black* 236; 5 *Vesey* 734; 10 *Ib.* 292, 193; 8 *Ib.* 163; *Prec. in Ch.* 538; 2 *Coxe's Ch.* 77; 2 *Young and Jarvis* 172; 3 *Swanst.* 108; 3 *Harr. and McHenry* 324; 3 *Randolph* 238; 2 *Bibb* 78; 1 *Alab. Rep.* 458; *Ambl.* 209; *Drury on Inj.* 237; *Eden on Inj.* 157; 5 *Vesey* 129; 2 *Atkyns* 83; 1 *Vesey* 140, 542; 2 *Green's Ch.* 353; 1 *Mylne and Keen* 154; 6 *Eng. Cond. Ch.* 558; 3 *Meriv.* 688; 18 *Vesey* 220.

**THE CHANCELLOR.** The question which lies deepest in this controversy is that which respects the original rights of these companies under their respective charters. It is contended by the purchasers under the Willink mortgage, that the agreement of February 17th, 1836, is void against them, it being subsequent to that mortgage; and particularly if the agreement binds the canal company to permit a constant flow of three square feet of water at the ravine; for that such a flow would destroy the canal. It is answered by the society, that if that agreement is void, then they claim to be remitted to their original rights under their charter; and that, in view of those rights, the canal company are not authorized to touch, or in any way interfere with any of the head waters of the Passaic. To this the company reply, that the legislature had the power and constitutional right to authorize them to take, for the purposes of the canal, not only the lands and waters of individuals, but even the lands and waters of the society; and that the terms of their charter are unlimited in this respect. If this question shall be presented for discussion in any stage of this controversy, it will be the duty of the court to decide it. But certainly this court would not be asked, at this late day, to grant a preliminary injunction against the canal company, and suspend their operations till a question like this should be decided.

As to the right of the canal company to drop the waters they bring from Lake Hopatcong into the Rockaway, with the

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

view of taking an equal quantity of water out of the Rockaway on the other side of it, and thus saving the expense of an aqueduct, the question has passed *sub judice*. This court, on two successive applications for an injunction, has refused to act against the company on a denial of that right.

As to that part of the cross-bill which asks a specific performance of the agreement of February 17th, 1836, the counsel for the society do not contend that in that aspect of the case the court should grant a preliminary injunction.

But it is said on the part of the society, that they do not ask a specific performance; that the agreement has been performed; and that the society ask the interference of the court to prevent the company from now repudiating it; that is to say, to restrain the company from preventing the flowing of water from the canal at the ravine, according to the terms of the agreement. This involves several questions. One of these questions, and which was elaborately argued at the bar, that is to say, whether an injunction could issue to restrain the company from preventing the flow of water from the canal, I do not find it necessary to consider. The present motions are denied on other grounds.

What is the agreement between the company and the society? The society claim that it is for a constant flow of three square feet, unqualified by any other rule or consideration. This, the proof now before the court seems to show, would destroy the canal. On the other hand, the extent of damage to the society by stopping the flow from the canal, is entirely uncertain. The mills might suffer more or less, for a portion of the year, longer or shorter, in dry seasons. Should not the court, under such circumstances, leave the society to their compensation in damages at law? It is sufficient for me to say, that under such circumstances I could not grant a preliminary injunction.

But I am not so well satisfied that this agreement calls for a constant flow of any quantity of water, as to be willing to grant an injunction on the society's bill, if all other difficulties in the way of such injunction were removed; and a doubt as to the correctness of the society's construction of the agreement in this respect would be sufficient ground for denying the injunc-

---

Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.

---

tion asked by them for the purpose of compelling a constant flow.

If the agreement does not call for a constant flow, but only for a flow at such times and in such quantities as to keep the middle canal of the society in a state to supply twenty-two square feet of water, should an injunction to any extent go? Several objections are made to it. First. That the present holders of the canal, whether they be the old canal company or a *rara avis in terris*, (in the language of Mr. Wood,) hold it under a mortgage made prior to this agreement.

Second. That the society have not fulfilled their part of the agreement; but that they permit an escape, under their embankment, of a quantity of water nearly or quite equal to a flow of three square feet.

Third. That there is no sufficient evidence that the society have not had, during the whole season, water enough, if it were properly husbanded, and their works were kept tight, according to the agreement, to supply twenty-two square feet for use on the middle canal.

If the agreement does not call for a constant flow, I am of opinion that the society cannot be allowed to permit such an escape of water as, from the proof now before the court, it appears there is, and still claim the flow at the ravine provided for in the agreement. If it is impracticable to prevent such escape, then it is impracticable for the society to comply on their part with the terms of the agreement; and the result is simply this, that the society are unable to use all the water three times over; which they might be able to do if they could comply with the terms of the agreement.

Again, if there has been any scarcity of water at Paterson this season, beyond what would have existed independently of the operations of the canal company, yet, if that scarcity was produced only by the filling of the enlarged canal, and ceased after it was filled, the application for an injunction fails. But it is by no means clear, on the proof that is now before the court, that the filling the canal, this season, did not add to, rather than diminish the flow at Paterson. Indeed, if the filling the canal was calculated to reduce the flow to the falls below the extreme reduction which was the necessary result of so



---

**Morris Canal and B'k'g Co. v. Society for Establishing Useful Manufactures.**

---

continued and severe a drought, it is difficult to imagine how the season could have passed with so little interruption of the works at Paterson.

Without permitting myself to be drawn further into the questions that may be involved in other prayers of the cross-bill, it seems to me there is no sound equitable principle on which the court can grant the prayer for an injunction.

It is obvious that, in this view of the case, the court cannot dissolve the injunction obtained by the company.

The company's bill charges that, at the time of the breaking of the gate and waste-way at the ravine, the water of the Passaic was running over the dam above the falls made by the society to divert the water to their works; and the answer does not deny, but admits the charge.

Under these circumstances, it seems to me that a dissolution of the injunction would be a present recognition by the court of the right of the society to a constant flow at the ravine of three square feet. This, as intimated before, I am not now prepared to declare.

Both motions are denied.

**CITED in *Att'y-Gen. v. Paterson*, 1 Stock. 633.**

---

Stires v. Stires.

---

— STIRES v. — STIRES AND OTHERS.

1. In October, 1837, D. S., being then seized of a farm on which he lived, and of no other real estate, made his will, by which he directed his executor to pay the debts out of his personal estate, and in defect thereof, to sell so much of the real estate as to pay the debts; and from and after the payment thereof, and subject thereto, then that the residue of the personal estate be divided between his widow and his nephew D. D.; and the rents and profits of his real estate be distributed to them during their lives; and that, on their deaths, respectively, their respective shares of such rents and profits go to H. C. during his life; and that, on his death, all the said real estate should go to the children of the said H. C.

2. In April, 1839, D. S. bought another farm, and paid \$2000 and odd of the purchase money, and for the balance gave a mortgage on the farm so bought; and afterwards, to discharge that mortgage, borrowed moneys on his bonds, some of which existed as debts against his estate after his death.

3. D. S. died in October, 1841, without having altered or republished his will.

4. On the death of D. S., the farm purchased by him after making his will, descended to a brother and nephews and nieces, his heirs-at-law. *Held*, that the descended land was chargeable with the debts before the land devised.

On the 2d of October, 1837, Daniel Stires, being seized of a farm on which he lived, and of no other real estate, made his will, by which he directed the executor thereof to pay all lawful claims against his estate out of his personal effects; and, in defect thereof, to sell so much of the real estate as to fully pay and satisfy all just claims and demands; and from and after the payment thereof, and subject thereto, then that all the rest and residue of the personal estate be divided between his widow and his nephew Daniel Davis; and that the rents and profits of all his real estate be distributed to his widow and his said nephew, during their lives; and that, on their deaths, respectively, their respective shares of such rents and profits go to Henry Cole during his life; and that, on his death, all the said real estate should go to the legitimate issue of the said Henry Cole. The will then declared the gifts and bequests therein made to his wife to be in lieu of dower, and only on condition that she accepts them as such.

## Stires v. Stires.

After the making of the will, on the 9th of April, 1839, Daniel Stires bought another farm, called the Hock farm, at the price of \$6800; of which sum he paid, in cash, \$2267, and for the balance of which he gave a mortgage on the said Hock farm; and to discharge that mortgage, he afterwards borrowed moneys on his bonds, some of which are still outstanding against his estate.

He died on the 8th of October, 1841, without having altered or republished his will, leaving a brother and nephews and nieces his heirs-at-law.

A bill was filed by the devisees against the heirs-at-law and the executor, stating the foregoing facts, and praying that the Hock farm might be sold to pay the debts.

The cause was heard on a demurrer to the bill.

*H. W. Green* and *G. D. Wall*, in support of the demurrer. They cited *Cowp.* 90, 305; *Salk.* 238; 1 *P. Wms.* 575; 2 *Bl. Com.* 378; 6 *Cruise's Dig.* 37; 9 *John. Rep.* 313; 3 *Johns. Ch. Rep.* 310; 5 *Ibid.* 441; 4 *Kent's Com.* (2d edit.) 510, 512, 421; 1 *Story's Eq.*, § 577; 1 *Bro. Chan. Rep.* 526.

*P. I. Clark* and *P. D. Vroom*, *contra*. They cited 1 *Bro. Ch. Rep.* 524; 2 *Atk.* 424, 431; 1 *Mad. Ch.* 483, 492; 3 *Atk.* 556; 1 *Dickens* 382; 1 *Bro. Ch.* 261; 2 *Ibid.* 524, 257; 3 *Vesey*, 114; 6 *Ibid.* 199; 8 *Ibid.* 106, 116, 122, 124, 295; 4 *Dess.* 323; 3 *Mad. Rep.* 453; 3 *Johns. Ch. Rep.* 312.

**THE CHANCELLOR.** The question arising upon the facts in this case is, whether the descended lands or the devised lands shall pay the debts.

The order in which assets are applicable in payment of debts, as stated by *Ld. Thurlow*, is—1st. The personal estate; 2d. Ordinarily speaking, estates devised for the payment of debts; 3d. Estates descended; 4th. Estates specifically devised, though they are charged generally with the payment of debts. *Sir R. P. Arden*, Master of the Rolls, (afterwards *Ld. Alvanley*,) states the four classes thus: 1st. The general personal estate, unless exempted expressly, or by plain implica-



---

Stires v. Stires.

---

tion ; 2d. Any estate particularly devised for the purpose and only for the purpose of paying debts ; 3d. Estates descended ; 4th. Estates specifically devised.

The will in this case is nothing more than a general charge on all the real estate the testator had at the time of making his will, for the payment of his debts, or of such portion thereof as his personal estate should be insufficient to pay.

The testator having acquired lands subsequent to the making of the will, which on his death descended to his heirs-at-law, the question is, whether such a general charge on all the estate he had at the time of making the will, is to have the effect of charging the lands devised subject to such general charge, in exemption of the after-acquired and descended lands.

At the making of the will the testator could have had no intention as between the devised estate and the descended estate, for the reason that at that time he owned none but the devised estate. The will, then, is not a selection or designation of certain lands to pay debts, in exoneration of other lands.

In *Galton v. Hancock*, 2 *Atk.* 424, 430, decided by Ld. Hardwicke, first in 1742, and again in 1743, the defendant's husband being seized in fee of an estate, mortgaged it in 1724, to secure the payment of a bond he had previously given. In 1728, he made his will, and devised to his wife this estate in fee, and also a lifehold estate. The will sets out with a desire that all his debts may be paid in the first place ; and concludes with a general residuary devise to his wife, whom he makes executrix. He afterward bought the reversion in fee of the lifehold estate, and died without altering his will. It was held to be clear that the purchase of the reversion after the making of the will was a revocation of the will, *pro tanto* ; and consequently this latter estate descended upon the heir. The question was, whether the descended estate or the devised estate should pay the debt secured by the mortgage. The Ld. Chancellor first decided that the devisee should take the devised estate *cum onere* ; but afterwards, on a re-hearing, he decided that the descended lands should pay the debt.

This case was decided in favor of the devisee, notwithstanding the testator had left a mortgage on the estate devised. The Chancellor said that, in equity, the land is only regarded as

---

Stires v. Stires.

---

security for the money ; and that the election of the holder of the bond and mortgage, as to the course he will take to get his money, will not determine which fund ought properly to be charged, nor vary the right as to those funds. In the case before us, there was no mortgage: the debts are generally bond debts, or simple contract debts only.

The case of *Powis v. Corbet*, in 1747, also decided by Ld. Hardwicke, was a case in which the testator had created a particular trust out of particular land, for the payment of debts, and subject to that trust devised it over. It was held that the devisee could take no benefit but of the remainder after the whole burden upon it was discharged. In this case Ld. Hardwicke expressly recognized the decision in *Galton v. Hancock*.

In 1780, the case of *Davis v. Toppe*, 2 Bro. Ch. Rep. 524, came before Ld. Thurlow. Toppe, seized of real estate subject to a mortgage, made his will, and as to his worldly estate, real or personal, after payment of his debts, disposed thereof as follows: to his sister, Sarah Lloyd, an annuity for life, and several pecuniary legacies; and charged all his real and personal estate with the payment of his debts and legacies; and subject thereto, devised all his real estate to his nephew for life, with remainders over, and his personal estate to his said nephew. After making the will he purchased an estate, and died without issue, leaving the said Sarah and her sister his heirs-at-law, on whom the after-purchased estate descended. In this case, also, the lands devised were subject to a mortgage at the time of the devise, and remained so to the death of the testator. The case of *Galton v. Hancock* was relied upon on the part of the devisees; and the case of *Powis v. Corbet* was cited on the other side. In giving judgment, Ld. Thurlow said he heard the devisees principally to obtain a distinction between *Galton v. Hancock* and *Powis v. Corbet*. He decides the case before him on the following reasoning. After stating that in *Powis v. Corbet* two estates were in the possession of the testator when he made his will, and that one was devised, charged with a term for the payment of debts, he says, that the effect of the full principle of the decree in that case, and in the case of *Galton v. Hancock*, is simply this: "Where a testator gives the whole of his estate at the time of the devise, subject to a gene-

---

Stires v. Stires.

---

ral charge, he means to give the devisee all that can be saved of his affairs after payment of his debts. If he afterwards becomes possessed of another estate, thus much is clear; by charging his estate, (that is, all he had at the time,) with the payment of his debts, it could not be in his contemplation to charge the estate he gave in favor of an estate which he had not. In such case, the estate descended, (which the testator had not at the time,) could not have been the object of an intention to exempt: whereas, if a testator has two estates, and charges one, the inference is that he means to exonerate the other." "The principle (he says) which seems to distinguish the case of *Gallon v. Hancock*, is this: when a general charge is made, applicable to the whole estate of the testator at the time, no intention appears that the estate is so charged with a view to exonerate future property; but where a testator charges part of his estate, leaving other part (which he has at the time) to descend, his inclination to burthen a part in exoneration of the rest is manifest." It seems to me that this reasoning is entirely satisfactory.

The case of *Milnes v. Slater*, 8 *Vesey*, 295, decided by *Ld. Eldon*, is not opposed to this view. The question there was, whether the will created only a general charge, or a particular charge on a particular fund. The will declared that if, at the decease of the testator, there should be any mortgages or other encumbrances affecting his estate in *Bantry*, *Austerfield* and *Timberland*, or any of them, the same should not be discharged out of his personal estate, but should remain charged on his said estates respectively, until discharged by the several tenants for life, to whom the said estates were respectively limited. The testator purchased other estates after making his will, in *Bantry*, *Austerfield* and other places, which descended to his heirs-at-law. The question was, whether the descended estates should be applied to pay the mortgages on the estates at *Bantry*, *Austerfield* and *Timberland*. *Ld. Eldon* decided that "a real fund had been created" in that case, for the payment of the mortgage debts. He said that "a real fund created" was the construction he put on the term "selected," used by *Ld. Alvanley*, in *Manning v. Spicer*. He said he perfectly agreed that if the testator had done no more than generally



---

McKnight v. Robbins.

---

subjecting the mortgaged estates, merely leaving them subject as the law would if he had said nothing, that would not be enough to protect the descended estates. He declared his opinion to be, that the testator had created a particular fund by the words of the above-stated clause, and that thereby the descended estates were exonerated.

I will not go further into the cases. They have all been reviewed by Chancellor Kent, in *Livingston v. Newkirk*, 3 *Johns. Ch. Rep.* 312; a case presenting the very question raised here, and deciding that the descended lands were first liable. It will be so decreed in this case.

Decree accordingly.

---

JOHN L. McKNIGHT v. VANROOM ROBBINS.

A and B entered into an agreement that A should furnish 2700 peach trees at his expense, and that B should plant and cultivate them on his farm, at his expense, and should pick and market the fruit, during the life of the trees, at the joint expense of the parties, and account to A for half the net proceeds of the sales. The trees were furnished and planted and cultivated accordingly. A died, and the administrator of his estate sold his interest to D. Held that D could come into this court for the performance of the agreement, and for an account and payment of half the net proceeds of the sale.

---

In April, 1841, Richard Jaques and Vanroom Robbins entered into an agreement that Jaques should furnish 2700 peach trees at his own expense, and that Robbins should plant and cultivate them on his farm at his expense, and should pick and market the fruit at the joint expense of the parties to the agreement, and account to Jaques for half the net proceeds of the sales. Jaques procured the trees, and Robbins planted and cultivated them according to the terms of the agreement.

In February, 1842, Jaques died, intestate, and in July, 1842, the administrator of his estate sold the interest which Jaques had in the peach orchard, to John L. McKnight.

---

McKnight v. Robbins.

---

On the 11th of July, 1843, McKnight filed his bill, stating the agreement, and his purchase of Jaques' interest; that the orchard then contained a crop of the value of at least \$1000, which would be fit for market about the 1st of August, thereafter.

The bill then states that Robbins is in slender circumstances, &c., and prays that he may be enjoined from picking and marketing the fruit, and that a fit person be appointed by the court to do it, for the benefit of the complainant and defendant.

On the 19th July, 1843, the Chancellor ordered that Robbins give bond, with security, in \$1000, conditioned to pick and market the growing fruit in a judicious manner, and keep a true account of the proceeds, and of the expenses of picking and marketing, and pay half the net proceeds according to the order of the court thereafter to be made, and that the said bond be delivered to the complainant, and that all further equity and directions be reserved.

On the same day the complainant was permitted to amend his bill, by adding a prayer for the specific performance of the agreement; and that the defendant account for the net proceeds of the fruit, from year to year, and pay over half thereof to the complainant.

On the 14th of February, 1844, the defendant put in his answer. A replication was filed, and testimony taken.

On the 19th of July, 1844, the defendant was ordered to give bond, with surety, in \$3000, conditioned for the proper picking and marketing the fruit then growing, and in other respects similar to the first bond required from the defendant.

The cause was heard on the pleadings and proofs, in September, 1845.

*S. G. Potts and P. D. Vroom*, for complainant. They cited 1 *Harr. Rep.* 81; 1 *Chitt. Gen. Prac.* 84, 6, 7; 9 *Barn. and Cresw.* 561; 17 *Eng. Com. Law* 443; 1 *Meriv.* 563; 15 *Vesey* 221; 12 *Eng. Cond. Ch.* 228; 5 *Ibid.* 383; 1 *Paige* 398; 17 *John. Rep.* 529; 12 *Wend.* 134; 23 *Ibid.* 606, 610; 24 *Ibid.* 389; 6 *Halst.* 184; 1 *Cumpb.* 331; 1 *Harr.* 38; *Gow on Partnerships*; *Collins on Partnerships*.

---

Seeley v. Price et al.

---

*Wm. N. Jeffers, contra*, cited 13 *Petersd.* 102; 2 *Harrison's Dig.* 1554, 6; 18 *Vesey* 300; 6 *Mad.* 145; 19 *Vesey* 291; 1 *Swanst.* 114, 116; 11 *Vesey* 3; 17 *John. Rep.* 529.

THE CHANCELLOR, after stating the case, decided that the complainant was entitled to an account, and payment of half the net proceeds that had come to the hands of Robbins from the sales of the fruit; and ordered a reference to take the account.

---

EBENEZER SEELEY v. FRANCIS PRICE AND OTHERS.

Leave to file a plea after demurrer overruled, will not be granted, if it is manifest that the plea offered, if true in fact, would be no bar to the relief sought by the bill.

---

After demurrer overruled, leave was asked to file a plea which had been prepared. The motion was resisted. The bill and plea were read.

THE CHANCELLOR. It is manifest that the plea offered, if true in fact, would constitute no bar to the relief sought; and that the only effect of permitting it to be filed would be delay.

Motion denied.



---

Corrigan v. Trenton Delaware Falls Co.

---

ANDREW CORRIGAN v. THE TRENTON DELAWARE FALLS  
COMPANY.

1. Proceedings under the "Act to prevent frauds by incorporated companies," passed February 16th, 1829.
2. Distribution of the assets.
3. Character of assets, whether legal or equitable.

In May, 1843, an injunction was granted, and receivers appointed to take possession of the property of "The Trenton Delaware Falls Company," under the act "to prevent frauds by incorporated companies," passed February 16th, 1829.

In November, 1843, a decree was made, directing the receivers to make sale according to law of all the lands and real estate of the company, including the race-ways, and all the chartered rights, privileges, and franchises belonging to the company and appertaining to the said race-ways, (a supplement to the above-stated act, passed March 11th, 1842, authorizes a sale of the chartered rights and privileges of such companies.) Nothing was said in the decree as to the encumbrances on the lands and works of the company, nor did it give any directions how the sale should be made.

The receivers being of opinion that under the said decree the property could not be sold free from encumbrances, obtained an act of the legislature, passed February 15th, 1844, authorizing them to sell the real estate, franchises and works of the company, free and clear of all encumbrances; and this act provides that nothing therein contained shall be construed to affect the rights of the several creditors of the company to receive their share of the proceeds of the sale according to law. The act, as well as the decree, is silent as to any mode of sale in reference to the encumbrances and the proper apportionment of the proceeds.

The receivers sold all the real estate of the company and their chartered rights, at one bid, to Charles S. Olden, for \$50,000, free and clear of all encumbrances. The sale was confirmed by the court, and a deed given accordingly.

## Corrigan v. Trenton Delaware Falls Co.

A report was subsequently made by the receivers, showing that, in addition to the said sum of \$50,000, they had received rents to the amount of \$2714.86, and that, after their disbursements, &c., there remained for distribution \$49,751.82. This account was confirmed, and an order was thereupon made directing the receivers to ascertain the amount and order of priority of the mortgage and judgment debts, and the amount of the other debts, to the end that a final order of distribution might be made according to law.

The race-way of the company runs through lands north of the Assunpink, acquired from different persons, and crosses the Assunpink, and extends on lands lying south thereof.

The receivers reported the order and priority of the debts as follows :

1. The Hargous mortgage, on 17 acres south of the Assunpink, dated November 27th, 1830, for..... \$3,300 00

2. Two mortgages to the Trenton Bank, on all the real estate of the company, both dated April 2d, 1833, one for \$4000, and the other for \$6700; and a judgment against said company, dated May 22d, 1834, for \$6237.87 ..... 16,937 87

3. A mortgage to Thomas Cadwallader and others, dated May 23d, 1834, on the real estate north of the Assunpink, for ..... 15,491 47

They then state the persons who have presented certificates said to be secured by this mortgage, amounting in all to \$24,057.05.

4. A note to the Trenton Bank, dated October 1st, 1835, for \$2087; another note to said bank, dated October 28th, 1835, for \$3504..... 5,591 00

That, to secure these notes and the mortgages and judgment of said bank above stated, the company, in October, 1835, assigned to the bank three leases; one to S. & T. J. Stryker, at \$450.67 per annum; one to James Hoy, at \$750 per annum; and one to J. McKelway, at \$166.90 per annum.

5. That, on the 19th of December, 1835, the company assigned to Wm. Potts, trustee, &c., the lease to Fish, Green & Co., at the annual rent of \$500, to secure

## Corrigan v. Trenton Delaware Falls Co.

certain persons the interest on their debts; and that seven claims (stating them) have been presented to the receivers under this assignment, amounting in all to \$4,900 00

In reference to each of which the receivers state that the interest has been paid by the rents.

6. A mortgage on certain lands of the company, dated June 2d, 1836, to Benjamin Fish and others, for \$9220.97; under which, certificates transferable were issued by the company to each person named in this mortgage, stating the amount due each. Claims have been presented under this mortgage, amounting to ..... 11,269 75

7. A mortgage of like character on certain lands of the company, dated June 4th, 1836, to Armitage Green and others, for \$7395.45. Claims have been presented under this mortgage, amounting to ..... 9,672 47

8. A mortgage on all the real estate of the company, dated June 3d, 1837, to Samuel S. Stryker and others, for \$10,000; reduced, February 3d, 1844, to ..... 7,016 26

On the 21st of February, 1843, a judgment was entered for the same debt in the Mercer Pleas, and execution issued thereon.

Three claims, represented to be secured by this mortgage, were presented, amounting to said sum of \$7016.36.

9. A mortgage on all the real estate of the company, dated February 25th, 1843, to Richard I. Bond, trustee, &c., for \$20,450.74. Certificates were issued under this mortgage, and claims have been presented under it amounting to ..... 4,563 49

10. A judgment of Peter T. Smith against the company, recovered in the Supreme Court, February 28th, 1843, for ..... 3,953 94

11. A judgment of Patrick McMahon against the company, recovered in the Supreme Court, February 28th, 1843, (same day,) for ..... 507 38

12. A judgment of Andrew Corrigan against the company, of same date, in Supreme Court, for ..... 2,809 00



---

Corrigan v. Trenton Delaware Falls Co.

---

The receivers further report, by way of recommendation, that each encumbrancer be paid his whole amount, according to the date of his encumbrance, as far as the fund will go, whether his encumbrance is on all the estate or only on a part of it.

Separate appeals from the report were filed by Peter T. Smith, Patrick McMahon and Andrew Corrigan, judgment creditors, and by John McKelway, a mortgage creditor of the company, interested in the mortgage to Fish and others, stating their respective grounds of appeal.

The exceptions or grounds of appeal will sufficiently appear in the argument of counsel and the opinion of the court.

*W. Halsted*, for the appellants.

There are mortgage creditors, judgment creditors, and simple contract creditors. The question is as to the manner of distributing the fund in court.

The receivers were authorized to sell not only the real estate, but the franchises. The franchises were not included in the mortgages, and could not be sold on execution. The real estate and franchises were all sold together at one bid, for \$50,000. The receivers report, in a previous report, that the real estate was worth only \$11,000. The report was confirmed. We have, therefore, \$39,000 derived from a sale of the franchises, not available to the mortgagees. How is this to be distributed? The judgment of the Trenton Bank is prior to all the mortgages, and is for \$17,000; and this takes all the real estate, for that was valued at only \$11,000. The property mortgaged, therefore, is swept away by that judgment. A fund arising from the sale of the franchises, and not bound by the mortgages, is in court for distribution. Have the mortgages a priority on that fund? or have the judgment creditors a priority? or are these assets equitable assets, distributable, *pro ratâ*, among creditors of all classes?

He contends they are legal assets, and that the judgment creditors are entitled to priority. In this state, an equity of redemption may be sold at law, and therefore is legal assets. The English rule, then, does not apply here. Judgment debts are the only debts entitled to preference here. Our law knows no distinction in favor of mere specialties. The real estate, then,

---

Corrigan v. Trenton Delaware Falls Co.

---

being swept away from the mortgagees, they have only their bonds left, and the judgments are entitled to priority over them.

For the purposes of this argument, he admits that the act authorizing the sale free from encumbrances was constitutional, but says the legislature gave no rule for distribution; that they could not have intended to change priorities, and deprive the judgment creditors of their priority. If the legislature intended to make the proceeds equitable assets, they would have directed distribution among all the creditors, ratably.

The Smith and Corrigan judgments were obtained before the bill was filed on which the decree in this case was made; and the decree does not authorize a sale free from encumbrances. So far as a mortgage is a lien *in rem* it has a preference; no further. But in reference to funds derived from other sources, judgment creditors are preferred by the very terms of the statute under which the bill in this case was filed.

The judgment creditors might have filed a bill in this court to subject the franchises to the payment of their judgments; and on filing their bill they would have obtained a preference. The franchises could not be sold, either under a decree of this court or under a judgment at law. The legislature made them liable, and did not give character to the proceeds of the sale of them, either as legal or equitable assets. He contends that they are legal assets, and that the judgment creditors have priority; that a judgment is a general lien on all property, including what cannot be levied on. The mortgagees have no standing here in reference to the proceeds of the sale of the franchises.

Next, certain leases came into the hands of the receivers, and they received rents on them. How are these rents to be distributed? They arose from the lands bound by our executions. There is no pretence that they are equitable assets. The mortgagor would have received the rents. The receivers took them for the benefit of the mortgagor and his creditors. They are legal assets, and go to the judgment creditors.

Next, when the Sertorie property (seventeen acres south of the Assunpink) was purchased by the company, it was subject to the Hargous mortgage of \$3300. He contends this is not a

## Corrigan v. Trenton Delaware Falls Co.

debt of the company; and that the holder of the mortgage is not a creditor of the company; and that the purchaser at the receivers' sale is liable for it to Hargous. That the act under which the receivers sold, authorizing them to sell free from encumbrances, intended only encumbrances created by the company. The purchaser at the receivers' sale bought subject to the mortgage.

*Mr. H.* cited 1 *John. Ch. Rep.* 130; 2 *Fonbl.* 403, note 1, 405; 1 *Story's Eq.*, § 551, 554; 4 *John. Ch. Rep.* 626, 687; 10 *Paige* 43, 598; 2 *Howard's Rep.* 608; 20 *John. Rep.* 554; 1 *Paige* 536, 637; 1 *Story's Eq.*, § 60, 64, 79, 576; 4 *Wheat.* 122; 8 *Ibid.* 1; 7 *John. Rep.* 477; 1 *Bay. Rep.* 179; *Domat's Civil Law* 5; 2 *Cranch* 277; *Leaming and Spicer* 427, § 6; *Ibid.* 369; 2 *Dall.* 310; 2 *Bay. Rep.* 38; 2 *Black.* 345; *Puffend, Book* 8, ch. 5, § 7; *Grotius, Book* 7, ch. 14, art. 7, 8; 15 *John. Rep.* 262; 1 *Com. Dig. Assets* 609; 2 *Story's Eq.*, § 577; *Prec. in Ch.* 128; 2 *Vernon* 405, 525; 2 *P. Wms.* 416, 463; 1 *Bro. Ch.* 135; 1 *Vernon* 67; 4 *Ves., Jr.*, 538; 3 *Atk.* 244; 3 *Vesey* 32; 5 *Ibid.* 438; 2 *Ves. and Beam* 252; 1 *Green's Ch. Rep.* 516; 1 *Swanst.* 573; 3 *Halst.* 317; 2 *Bro. Ch.* 57, 101, 152; 3 *John. Ch.* 229, 253; 4 *Peters' Rep.* 121; 13 *Ibid.* 464; *Cases Temp. Talbot* 224; 3 *Paige* 517; 1 *Scho. and Lef.* 236; 10 *John. Rep.* 517, 532; 2 *Paige* 867; 2 *Stuart* 378; 1 *Dickens* 150; *Williams on Ex'rs* 660, 1034; *Salk.* 42; 7 *Paige* 477; 9 *Barn. and Cressw.* 156, 160; *Ram. on Assets* 184, 317, 143-9.

*S. G. Potts, contra.* On the 14th of October, 1843, the receivers made a report that the debts amounted to \$120,000; that the rents unassigned were \$4779; and that the value of the real estate was \$11,100. November 6th, 1843, the court made an order directing the receivers to sell all the real estate and the franchises. On the 16th of February, 1844, before the sale was made, the legislature passed an act authorizing the receivers to sell free from encumbrances. The receivers sold accordingly; and the whole property was sold together for \$50,000. The receivers then made the report from which these appeals have been taken.



---

Corrigan v. Trenton Delaware Falls Co.

---

In that report the receivers adopted this principle, that the judgments and mortgages are liens on the whole fund, and are entitled to priority according to their respective dates.

It is contended that the \$50,000 is the product of two different kinds of property, viz., the real estate, valued at \$11,100, and the product of the sale of the franchises, \$39,000; and that the judgments are entitled to be first paid out of the proceeds of the franchises, and that the mortgages are only entitled to the \$11,100. This he opposed. He does not go into the doctrine of legal and equitable assets, believing that the contest will be settled before reaching that question. If the property sold was subject to the mortgages, the product of the sale is so subject, and the report is right.

By the act of incorporation, the company have power to convey their property, with the privileges granted by the act. By the terms of the mortgage, the company mortgaged the land, race-way, water, and the right to take water from the Delaware.

A power to convey includes a right to mortgage. *Saxton* 18. The mortgages, then, are liens, not only on the lands, but on the privileges, and on the right to improve and make profit of the works. The decree authorized the sale of the lands and all the rights, privileges, and franchises of the company; and the act of February, 1844, authorized the sale of the real estate, franchises, and works.

The report of the receivers, valuing the real estate, is no authority here. It cannot be true, because the receivers state the annual rents are \$8000. They must have excluded the race-way, as mere land covered with water, and worth nothing as such. It cannot be supposed that \$11,100 was the value of the company's property. Debts to the amount of \$120,000 were incurred upon it.

The error is in classing the franchises as personal property. The things granted by the act were, 1st, to exist as a corporation; 2d, to improve, &c., and draw water from the Delaware to make a water-power. The first class of franchises are political, and cannot be sold. The second class are property franchises, and may be sold, and were sold. The act of 1844 created a new company, by a new name. The political franchises of the old company were not destroyed.

If the purchasers at the receivers' sale bought the political franchises of the old company, then they must be the old company, and are liable for its debts. The second class of franchises are property franchises, and these passed by the sale.

The estate sold consisted of the lands, race-way, water, and rights appurtenant to the estate, and necessary to its enjoyment. And this was nothing more nor less than the estate mortgaged. These rights and privileges had been used; the dam was erected; the head and tail races made, and the water drawn; and the mortgages were of the property, and these improvements, and the right to draw the water. It cannot be doubted that this was the idea of the mortgagors and the mortgagees. The language of the mortgages is as broad as possible.

This class of franchises may be sold; and if the legislature think the principle of succession necessary, they may give the purchasers the political franchises. If a toll-bridge be mortgaged, and sold under the mortgage, would not the purchaser acquire the right to take toll? In reference to the property in this case, the whole value of it is the right to take the water, and the improvements made for the purpose of taking it, for use as water power.

By the franchises authorized by the legislature to be sold, property franchises only are intended. If this be so, the \$50,000 is the proceeds of the property mortgaged, and is to be distributed among the mortgage and judgment creditors, according to their respective priorities. The property, as it stood at the time of the sale, was the product of the moneys borrowed on these mortgages. The mortgagees lent the money to construct the work and acquire the water power. Shall they have the security of a dry ditch only?

There never was just such a fund in court to be distributed. We shall meet with a sea of difficulties if we attempt to travel the road pointed out by the opposite counsel. That counsel says there are two funds; one real, *i. e.*, lands; the other personal, *i. e.*, franchises. And the foundation of this distinction is a loose saying in the report, that the real estate was worth only \$11,100.

The property on which the canal is was taken by appraisement, and the amount of the appraisement is \$35,000. There

---

Corrigan v. Trenton Delaware Falls Co.

---

are no data by which the court can solve the question how much of the \$50,000 was bid for the land, and how much for the works and property franchises. The object of the legislature in granting the act of incorporation, was to create a public work ; and by the act of February, 1844, directing the sale, and constituting a new company, they intended to preserve it entire. Its value was as an entirety.

It may be asked, if the mortgages embraced all the land and the property franchises, why was it necessary for the legislature to interfere ? Answer : Here is a title novel in its character. A question might arise among the bidders, whether the purchaser would get the right to keep up the dam, &c., and draw water. If a doubt existed, the creditors would suffer. This was a sufficient reason for the legislature to interfere and provide for the sale of the property franchises. These are, in terms, expressly included in the mortgages ; and the \$50,000 is the proceeds of the mortgaged premises.

It was next insisted by the opening counsel, that the rents received by the receivers were legal assets, and belong to the judgment creditors. We admit they are legal assets ; but say, 1st. That the incidental expenses have exhausted them ; 2d. If they were in court, they would be applicable, first to pay the bank judgment ; the bank being both a mortgage and judgment creditor prior to the Cadwallader mortgage, the rents should go to the bank judgment, in aid of the claimants under that mortgage, the judgment of the appellants being subsequent to that mortgage. 3d. The Stryker judgment is prior to the judgments of the appellants, and would take the rents ; and the holder of it is not here complaining.

*P. D. Vroom*, in behalf of the Hargous mortgage, now held by McCall, and of the purchasers.

The McCall mortgage was an encumbrance on the property when it was purchased by the company, and the money due on it was a part of the purchase money. The company became bound to indemnify the vendor. They paid the interest to the spring of 1842.

The receivers reported this as an encumbrance on the property at the time of the sale, to be first paid.



It is objected, 1st. That it is not the debt of the company, but the personal debt of the mortgagor ; that the bond is not extinguished. 2d. That the company bought only the equity of redemption ; and that the receivers sold nothing more, and sold subject to this mortgage.

He answers, 1st. This was the property of the company. The fee was theirs, as much as if they had bought it free from encumbrance and then put a mortgage on it. And the receivers reported it to the court, the creditors and the public, as a part of the real estate of the company.

2d. The order for the sale was to sell the property of the company. Before the sale was made, the legislature, for obvious reasons, interposed, and directed the sale to be made free from encumbrances. The title to be given to the purchasers was to be free from encumbrances. The terms of the act are "as good a title as the company had, free from encumbrances." Not from encumbrances made by the company, but from all encumbrances. Now, what title had the company ? If it was a fee, that title passed free, &c. If the act had said nothing of the title to be given, the question might have come up. But the power and language of the legislature reaches over all the objections. Was not the property sold free from encumbrances made by the company ? On what principle ? Simply because the legislature ordered it to be so sold.

The purchasers bought the property on the terms mentioned in the act. Are they to pay this mortgage in addition to what they bid ? The act gives one rule as to all the mortgages. It would be a surprise, not to say a fraud on the purchasers, to charge them with this mortgage. The act was not necessary to sell the property. The object of the act was to give confidence to bidders ; to sell the whole property and title ; and to give the purchasers a title free from all encumbrances.

This view does no injustice to the appellants ; for, if sold subject to the mortgage, the property would have brought so much the less. If the property had been sold by the sheriff, or by the receivers without the act, grave questions would have arisen. But the act removed all difficulties. Were the bidders to inquire who put on the encumbrances ?

There is no dispute that the property covered by this mort-

---

Corrigan v. Trenton Delaware Falls Co.

---

gage is worth more than the mortgage on it. It is put down by the receivers as part of the realty, at \$10,000.

This mortgage was the debt of the company in respect of that land. The authorities on the other side do not alter the equitable rights of the parties. True, the company did not become the legal debtor, but they were in equity bound to indemnify the mortgagor.

It is not a question made by McCall, whether the legislature could take his fund, or the land mortgaged to him. McCall submits, and comes here for his portion of the fund. Has he not a right to come here and say he will take the money? If McCall had filed his bill against the purchasers, a question might have arisen whether the legislature could direct a sale free from his mortgage. But he foregoes it and comes here, and the value of the land being more than equal to his mortgage, he is entitled to the amount of his mortgage. By this construction no one sustains loss; and it was for the benefit of the after creditors that the property should be sold in this way.

Mr. Vroom spoke also to the first question argued by Mr. Potts, and concurred in his views. He said, also, that if the property had been sold simply under the mortgages, the purchasers would have taken all the property, dams, embankments, &c., and the right to use them, the same as the company had the right; and could enjoy it all without being incorporated. The old company would still exist, but their property would be gone.

The act conferred new political franchises on the purchasers. The purchasers hold their political rights under the act. But if it should be supposed they hold their political rights under the sale made by virtue of the act, how much more was bid on that account? The question is answered by asking how much it would cost to get an act of incorporation. He presents this alternative view, but submits that the view taken by Mr. Potts is the correct one.

*Mr. Halsted, in reply*

THE CHANCELLOR. The mode suggested by the counsel for the appellants for ascertaining the product of the sale of the

---

Corrigan v. Trenton Delaware Falls Co.

---

franchises, cannot be adopted. The tract of seventeen acres, south of the Assunpink, was valued by the receivers at \$10,000, and all the rest of the real estate of the company at only \$1100. It is evident the receivers valued the land occupied by the canal, race-ways, and their banks, as mere land. The canal and race-ways cost the company some \$75,000.

Is there any other mode of ascertaining the product of the sale of the chartered rights, as distinct from the proceeds of the sale of the real estate? Certainly none. The product of the receivers' sale, therefore, is an entire fund, of one character. They are not equitable assets, distributable *pro ratâ* among creditors of all classes. The counsel on both sides admit they are to go to the mortgage and judgment creditors according to law. The difficulty is as to the legal priorities.

Several of the mortgages cover the whole property of the company, and several cover only separate parts of it. It is clear that, so long as the sale stands, and the decree confirming it, it being a sale of the whole property together for an entire sum, it is impossible to adopt any other order of priority than the dates of the respective encumbrances. The receivers might, possibly, have sold in such parcels as would have enabled them to give to each encumbrancer his share "according to law," in reference to the liens on the different parts and on the whole and the dates of the liens. But the race-way and the franchises appurtenant thereto could not be sold separately with any propriety, nor the canal and race-ways sold in parts. The legislature, therefore, in directing that the several creditors should receive their respective shares of the proceeds "according to law," could not have understood these words to have the meaning before referred to. As the sale was made, and contemplated by the legislature to be made, there was no law remaining according to which the proceeds of the sale could be distributed, but the law of priority in date of encumbrance. All other law is absolutely precluded and excluded.

On this part of the case, therefore, the decree confirming the sale is the law of the case, and no rule of distribution exists except the one adopted by the receivers.

The next subject of inquiry is No. 4 in the report of the receivers. The lessors, the company, assign the rents to accrue



---

Corrigan v. Trenton Delaware Falls Co.

---

on certain leases, as security for the payment of their notes. Does this constitute a lien on the fund in court for the amount of the notes, in preference to subsequent mortgage and judgment creditors? I cannot see that it does.

No. 5 in the report of the receivers is a claim of the same kind.

Next, the rents received by the receivers go to the judgment creditors. The Trenton Bank has the first judgment, which is a lien on the whole fund in court, as well the proceeds of the receivers' sale as these rents.

Next in priority of date is a mortgage, whose lien is only on the proceeds of the receivers' sale, and not on these rents.

Next in priority of date is a judgment creditor, whose lien is also on the whole fund in court, including the rents. The fund in court, exclusive of the rents, is sufficient to pay the bank judgment and part of the mortgage. Is it the duty of the court to apply the rents to the payment of so much of the bank judgment, in aid of the mortgage, and in prejudice of the subsequent judgment creditor?

It is so claimed on the part of the mortgagee. I think not. The equity of the mortgagee is not more than equal to that of the subsequent judgment creditor, and between equal equities the court does not interfere.

The next inquiry relates to the Hargous mortgage, now held by McCall, on seventeen acres of land south of the Assunpink, through which the race-way runs. This mortgage was on the property when the company bought it. It is contended by the counsel for the appellants, that the purchaser at the receivers' sale bought subject to this mortgage, and that it should not be paid out of the proceeds of that sale. It seems to me that the legislature, by the act of February, 1844, intended that the purchaser at the receivers' sale should take the property of the company free from all encumbrances whatever. That McCall might compel the payment of the bond by Hargous, the obligor and mortgagor, notwithstanding the act, and the sale under it, would make no difference in this court. In that case, Hargous would be let in upon the fund for the amount paid by him. There may be something extraordinary in the nature and provisions of the act of February, 1844, but our present inquiry

---

Campfield v. Johnson.

---

relates simply to the distribution of the fund; and we have nothing to do but to carry out what seems to be the intention of the act.

The exception to certificates for interest upon interest, to holders of claims under some of the mortgages, is allowed.

---

CALVIN CAMPFIELD v. PETER A. JOHNSON.

1. A judgment creditor of a trustee restrained from selling his title and interest in the trust property by execution.

2. J. C. mortgaged lands to C. C., and afterwards conveyed the lands to C. C., in trust to apply the rents and profits towards paying the mortgage and a certain note given by J. C. to P. S., until a sale could be made of the premises at a fair price, and then to sell the same, or any part thereof, to pay the mortgage and the note, and to pay the residue of the proceeds of the sale to J. C.

3. C. C. went into possession of the lands. J. C. afterwards died intestate, leaving infant heirs. C. C. assigned the mortgage to P. A. J., who filed his bill of foreclosure thereon.

4. Pending the foreclosure suit, P. A. J. recovered judgments at law against C. C. on his personal liabilities, and caused executions to be levied on "all the right, title and interest" of C. C. in the premises so conveyed to him in trust. On bill filed by C. C., sale under the said levies was enjoined. And on motion to dissolve, without answer, the injunction was retained.

---

On the 20th of March, 1830, Jonathan Campfield, since deceased, executed to Calvin Campfield a mortgage on three tracts of land in Morris county, to secure a bond of the same date, given by the said Jonathan to the said Calvin, conditioned for the payment of \$2000.

On the 18th of October, 1833, Jonathan Campfield and his wife executed to the said Calvin a deed for the mortgaged premises, in trust to apply the rents and profits towards paying the said encumbrance and a certain note held by Polly Sayre, until a sale could be made of the premises at a fair price, and then to sell the same, or any part thereof, towards paying the said mortgage and note, and the residue of the proceeds to pay over to the said Jonathan, or as he should direct; and in case the premises should not be sold before the mortgage became due,

---

Campfield v. Johnson.

---

then to mortgage the premises again or sell the same, to pay the said mortgage and note.

On the 5th of March, 1834, Calvin Campfield, as such trustee, conveyed one of the said tracts, a seventy-acre tract, to Alfred Ford, by deed executed by the said Calvin and his wife. Ford afterwards conveyed a part of this tract to Lewis Johnson, and the residue of it to Joseph Cutler.

Jonathan Campfield, the mortgagor, died in Pennsylvania, leaving two infant sons, Jonathan and George, his heirs-at-law, and a widow, Martha, who has since intermarried with William Craig.

On the 26th of October, 1844, Peter A. Johnson filed his bill of foreclosure on the said mortgage, stating the foregoing facts, and that the said Calvin Campfield has assigned the mortgage to him.

The bill states that the complainant is informed and believes that Charles Ford, a judgment creditor of Alfred Ford, insists that Calvin Campfield conveyed the said premises to Jonathan Campfield, and took from him the said mortgage for the purpose of defrauding the creditors of the said Calvin.

Calvin Campfield, the widow and infant heirs of Jonathan Campfield, and others, were made defendants. Calvin Campfield put in his answer to the bill.

In ———, 1845, Calvin Campfield filed his cross-bill, stating, among other things, that on the 14th of April, 1830, a judgment was entered against him in favor of Peter A. Johnson, for \$890.16; and that Johnson has caused execution to be issued thereupon, and to be levied on "all the right, title and interest" of him the said Calvin in the said three tracts of land described in the said mortgage.

That in 1838, Johnson recovered another judgment at law against him, on a note for \$130, and that he has caused execution to be issued thereupon, and levied on "all the right, title and interest" of him the said Calvin in the said three tracts of land, and caused a sale thereof to be advertised for the 21st of July, 1845.

This bill further states that when he, Calvin Campfield, in March, 1834, conveyed the seventy-acre tract to Alfred Ford, the said Alfred, with one Henry Ford, gave a bond conditioned



---

Campfield v. Johnson.

---

for the payment of the said mortgage in one year, and to indemnify Jonathan Campfield; and that that bond has not been paid. That if the said seventy acre tract was sold on a final decree of this court, free from embarrassments, it would bring more than enough to satisfy all that may be found due Johnson on the mortgage, leaving the other tracts free for the said infants, and charges that the object of Johnson in selling under the said executions and levies is, to buy at a nominal sum, and get possession, and that such sale can only serve to embarrass the title.

Calvin Campfield is in possession of the other two tracts described in the mortgage.

This bill also states facts on which a charge is founded, that the assignment of the said bond and mortgage was fraudulently obtained by Johnson, from the agent of the said Calvin, without consideration; and also states facts on which charges are founded, that the said judgments were fraudulently obtained.

This bill prays that the said judgments may be set aside, and that the said Johnson may be decreed to deliver up to the said Calvin the said bond and mortgage; and an account of all moneys that Johnson may have received from Ford on the said bond and mortgage; that the said seventy-acre tract may be sold by the order of this court, &c.; and that, in the meantime, Johnson and the sheriff may be restrained by injunction from selling under the said executions and levies.

The injunction was granted. A motion was made, without answer, to dissolve the injunction.

*J. J. Scofield and J. W. Miller*, in support of the motion.

*S. Scudder and W. Pennington*, contra.

THE CHANCELLOR. On this motion the transaction out of which the mortgage grew must be taken to have been *bona fide*, and the mortgage and the subsequent conveyance by the mortgagor to the mortgagee, in trust for the purposes stated in the pleadings, to be valid. And the motion will be considered, too, as if the infant heirs of the mortgagor were properly represented.

---

Campfield v. Johnson.

---

The question now before us is not whether Johnson properly obtained possession of the bond and mortgage; nor whether the judgments obtained by Johnson against Calvin Campfield should be set aside. It is whether Johnson, while proceeding to foreclose the mortgage, shall be permitted to sell, on judgments against Calvin Campfield on his own personal liabilities, the legal estate held by him in trust for the purposes stated in the pleadings.

I think the *cestuis que trust* should be protected from such a proceeding. It was said in argument, that Johnson has the right to sell, under the judgments, the interest of Calvin Campfield in these lands, and then to have a jury pass on what that interest is; that is, to take the ground that the whole transaction of the conveyance by Calvin to Jonathan, and the mortgage and deed in trust from Jonathan to Calvin, were fraudulent and void as against creditors. This is not the right way of getting into that controversy.

Johnson's own bill, the foreclosure bill, sets out the trust, on which the conveyance from Jonathan to Calvin, after the giving of the mortgage, was made.

A trustee cannot dispose of a trust estate as his own estate, unless to a *bona fide* purchaser without notice. If he do, the estate may be followed.

Calvin Campfield has no title or interest which he could convey to Johnson, in payment of his own debt. Johnson, therefore, cannot be permitted to sell his title and interest on execution. To allow him to do so could only have the effect of embarrassing the interest and estate of those beneficially interested.

Motion denied.

---

Hamburgh Manufacturing Co. v. Edsall.

---

THE HAMBURGH MANUFACTURING COMPANY AND OTHERS  
v. JOSEPH E. EDSALL, ELIAS L'HOMMEDIEU AND OTHERS.

1. A sheriff's sale of land declared unlawful by reason of means used to prevent competition, and the consequent sacrifice of the property.

2. Several executions had been levied by a sheriff on the lands of "The Hamburgh Manufacturing Company," of which the first in priority was in favor of E. The same sheriff had in his hands, at the same time, an execution issued on a decree in chancery, on the first mortgage, for the sale of the mine farm of "The Clinton Manufacturing Company," and also an execution at law against the said Clinton company, by virtue of which he had levied on the said Clinton company's mine farm. E. held a subsequent mortgage on this Clinton mine farm. Prior to the sale, certain creditors of the Hamburgh company, having no judgments, together with E., entered into an agreement in writing, among themselves, that L., one of them, should buy the lands of both companies, as their trustee, as a means of securing their debts against the Hamburgh company, including E.'s judgment and other claims he had or made against the Hamburgh company, and his mortgage on the Clinton mine farm. There was also an understanding with P., who held the bulk of the stock of both companies, and was carrying on or conducting the business of the Hamburgh company, that the said trustee should convey both properties to him, on his paying the debts of the said agreeing Hamburgh creditors, and the sums for which the properties should be struck off to the said trustee. By these means competition was prevented, and the properties were sold at a sacrifice, and bought by L., one of the agreeing Hamburgh creditors; the other judgment creditors of the Hamburgh company not being present at the sale. The sheriff's deed to L. was absolute.

3. On a bill filed by the Hamburgh company and P. and his assignees under the insolvent law and a subsequent assignee of all his estate, it was held that the sales of both properties were unlawful; and that L. was a trustee of the Hamburgh property for the Hamburgh company and its creditors. But that as to the Clinton property no decree could be made, the Clinton company not being parties to the suit.

Prior to December 7th, 1838, the sheriff of Sussex county had in his hands several executions, issued on judgments at law, against "The Hamburgh Manufacturing Company," a company incorporated by the legislature of this state, on the 10th of March, 1836, by virtue of which he had levied on all the real estate of the said company, and advertised the same for sale. Of these executions, the first in priority was in favor of Joseph E. Edsall.



---

Hamburgh Manufacturing Co. v. Edsall.

---

The same sheriff had in his hands, at the same time, an execution issued out of the Court of Chancery, on a decree in a foreclosure suit, for the sale of the mine farm of "The Clinton Manufacturing Company," another company incorporated by the legislature of this state, to raise about \$2500, the mortgage on which the said decree was made being the first lien on the said mine farm ; and also an execution issued out of the Common Pleas of Sussex county, against the said Clinton company, in favor of Robert Lewis and Joseph M. Brown, for \$1008.27. Joseph E. Edsall held a subsequent mortgage on this mine farm, for about \$4000. The sale of this farm had also been advertised, under these two executions, and stood adjourned to December 7th, 1838.

On that day, Joseph E. Edsall, the first judgment creditor of the Hamburgh company, and a number of other creditors of the said Hamburgh company having no judgments against said company, including Elias L'Hommedieu, entered into an agreement in writing, among themselves, reciting that the real estate of the Hamburgh company was advertised to be sold at sheriff's sale, and that they were in danger of losing their claims, or some part thereof, if the said property sold for less than \$17,000 ; and that, for the purpose of endeavoring to secure themselves, they deemed it advisable to purchase the said real estate, and also certain real estate of the Clinton Manufacturing Company in the county of Sussex, whereon is an ore bed, advertised by the said sheriff ; and covenanting and agreeing with each other to unite in the purchase of the said real estates ; and for that purpose constituting Elias L'Hommedieu their agent and trustee, in his own name and for his own and their use, to purchase the said properties, at any sum which, together with the encumbrances, should not exceed \$32,000 ; and authorizing and instructing L'Hommedieu to purchase and procure the assignment of certain encumbrances upon the said property, to wit, two mortgages given by Winslow to said Edsall, about June 1st, 1836, on the said Hamburgh company's property, or part thereof, and a mortgage given by Winslow to Joseph Sharp, on another part of said Hamburgh property, and of such mortgages and vouchers as might be necessary the better to secure the title to said property ; and also to purchase and

---

Hamburgh Manufacturing Co. v. Edsall.

---

procure from Joseph E. Edsall a mortgage executed by "The Clinton Manufacturing Company" to him, on the said Clinton ore mine, dated January 10th, 1838, for about \$4000, and authorizing and directing their said trustee to raise, by bond and mortgage on the said property, sufficient money to pay the purchase money thereof and the amount of the encumbrances above specified, and also \$2000 for the purpose thereafter mentioned, and also such further sum as might be necessary to pay the claims of such of them, the said creditors, as might desire the same in writing, and to purchase the necessary teams, wagons, and implements, and authorizing and directing the said trustee, in the event of his becoming the purchaser, to lease the said premises to some suitable, competent person, to conduct the furnace and works upon the said premises, for a term not exceeding three years, at a rent not less than ten per cent. on the whole cost of the property; and authorizing their said trustee to agree with the lessee, if he desires it, to sell to him the said premises, upon his securing to the said trustee the payment of the whole cost of the premises, including their respective claims, with interest, one-third part thereof, with interest on the whole, to be paid within one year, and the residue at such times as might thereafter be agreed upon; and, on compliance on the part of the lessee, with the contract or agreement for sale, the said trustee to make a deed of release to him in fee; and further agreeing, that if the said trustee should succeed in raising money for the purpose, he should appropriate it as follows: First, to the payment of the purchase money and expenses in procuring the title; second, to the procuring of the before-mentioned encumbrances; third, to retain \$2000 for the purpose of putting the furnace (on the Hamburgh property) in blast; and, lastly, to the payment of the claims of such of them, respectively, as may have requested the raising of money for them in manner aforesaid; and if there be any deficiency in the money raised, then in proportion to the respective claims of the said creditors last mentioned; and further agreeing, that upon the payment to them, respectively, of their claims, or any part thereof, raised upon the said premises, they would severally execute and deliver to the lender of the said money, a bond, with satisfactory security, conditioned that the said property, on a

---

Hamburgh Manufacturing Co. v. Edsall.

---

lawful sale thereof, should yield the amount that might be due thereon, with interest and costs; and that in the event of any deficiency, they would respectively refund so much money as might be necessary to make up such deficiency, in proportion to the amount paid them respectively; and further agreeing that, for the purpose of ascertaining the amount due them, respectively, they would forthwith settle and arrange the same with the Hamburgh Manufacturing Company, and procure their certificates of the amount due; and that in case of any dispute in such settlement with said company, the same should be referred to three indifferent persons, mutually chosen by the said differing creditors and the said company; and further providing, that in case the said company, or any of the said creditors, neglect or omit to settle the said claims, or choose three indifferent persons, as aforesaid, then the said claims should be determined by three disinterested persons, to be chosen by a majority of the said creditors, the report of any two of the persons so chosen to be conclusive; and further providing that nothing therein contained should prevent Joseph E. Edsall, one of the said creditors, from proceeding to the recovery of his encumbrances upon the said premises, in case the same should not be procured and purchased of him by the said trustee, in manner aforesaid.

This agreement was signed by Elias L'Hommedieu, for himself, as creditor and as trustee, and by Joseph E. Edsall and some twenty other creditors of the Hamburgh company, by themselves, their attorneys, or assignees, no one of them, except Edsall, having a judgment against the said Hamburgh company.

On the said 7th of December, 1838, the said mine farm of "The Clinton Manufacturing Company" was sold by the sheriff, and struck off to the said Elias L'Hommedieu, for \$4041.

On the 14th of the same month, the said sheriff sold all the real estate of "The Hamburgh Manufacturing company," in seven different portions. They were all struck off to L'Hommedieu, at bids amounting, together, to \$285. Different portions of the Hamburgh company's property were subject to mortgages, amounting, together, to about \$——.

The deeds to L'Hommedieu, for both properties, were abso-



---

Hamburgh Manufacturing Co. v. Edsall.

---

lute. L'Hommedieu, on the 31st of December, 1838, executed a lease of all the Hamburgh company's property, and of the said Clinton mine farm, to Edward W. Pratt, who owned the bulk of the stock of both said companies, and who, at the time of the making of the agreement by the said creditors among themselves, and at the time of the said sales, was carrying on or conducting the business of the said Hamburgh company. The terms of the lease were conformable to those of the lease provided for by the said agreement signed by the said creditors, except that \$1500 instead of \$2000 was the sum inserted therein to be furnished by L'Hommedieu to Pratt, for the purpose of putting the furnace in blast.

On the next day, L'Hommedieu and Pratt entered into a written agreement, under their respective hands and seals, by which L'Hommedieu, in consideration of \$30,000, to be paid to him by Pratt, covenanted to convey to Pratt in fee, by deed of release, with the usual covenants against his own acts, all the lands so struck off to him at the said sheriff's sales, including the said mine farm of the Clinton company; and Pratt covenanted to pay the said sum as follows: one-third thereof, with interest on the whole, on the first of December, then next, and the residue in two equal yearly payments thereafter, with interest, to be secured by bond and mortgage on the premises; the deed to be delivered on or before the said first day of December then next, on Pratt's paying and securing the said purchase money in manner aforesaid.

This agreement also provided that the mortgage held by Joseph Sharp, on part of the Hamburgh company's property, for \$2084.36, and two mortgages held by Joseph E. Edsall, on parts of the Hamburgh company's property, amounting together to \$5617.39, were to be paid out of the purchase money, or that if Pratt should pay them, the amount thereof should be deducted from the said purchase money.

Pratt was discharged as an insolvent debtor on the 22d of August, 1839, and thereupon executed an assignment of that date, of all his property to Elias Freeman and David Jones.

On the 17th of July, 1841, Pratt executed to Joseph B. Nones an assignment of all his estate, of every description, in

---

Hamburgh Manufacturing Co. v. Edsall.

---

trust for his creditors, including Nones, who was to be first paid, and as to any residue that might remain after paying his debts, in trust for Pratt.

On the 28th of January, 1842, a bill was exhibited by "The Hamburgh Manufacturing Company," Edward W. Pratt, Elias Freeman and David Jones, and Joseph B. Nones, complainants, stating the foregoing facts; and stating further, that Pratt had been endeavoring to effect a loan to pay off the said judgments against the Hamburgh company and the other debts of the said company, and that to give him an opportunity to do so, the sale under the said executions had been adjourned from time to time, and stood adjourned to December 5th, 1838. That progress had been made in the negotiation for a loan, and he had assurances that the money would be raised in three or four weeks. That under these circumstances, fearing that a sale might be forced, Pratt applied to some of his friends in New York, who determined to send a person with him to attend the sale, with authority to buy the property, if it became necessary. That accordingly, on the said 5th of December, 1838, Pratt went to Hamburgh, and that Aaron B. Nones accompanied him, with authority and with the means to purchase the property, if no agreement could be made between Pratt and the creditors of said company. That on the morning of the said 5th of December, 1838, and just previous to the hour of sale, Elias L'Hommedieu and Joseph E. Edsall, on the part and in behalf of the creditors of the Hamburgh company, most of whom were then present to attend the said sale, proposed to Pratt that some arrangement should be made that would be mutually beneficial to all parties concerned, and that to effect such arrangement they would undertake to raise money enough, by mortgage upon the property, to appropriate \$2000 for the purpose of carrying on the business of the company, and to pay off all the creditors; that they had had an interview with David Ryerson, Esq., and that he had offered to procure a loan of \$30,000, or of whatever sum, not exceeding that amount, might be required for the purposes aforesaid; but that the said loan could only be obtained on condition that the property should be sold, and some person become the purchaser of the said ore bed, (the Clinton company's mine farm,) and the property of the said

---

Hamburgh Manufacturing Co. v. Edsall.

---

Hamburgh company ; for that under the sale the title could be better perfected, and rendered free from all question, doubt or encumbrance ; and that as soon as the said loan was effected, the property should be re-conveyed to the said Hamburgh Manufacturing Company, or to Pratt. That in view of this proposition, and to give time for reflection, the sale was adjourned, by consent of all parties, to the next day ; that on the next morning a meeting of the said creditors and Pratt took place, Ryerson being present, and Joseph E. Edsall, in the presence of all parties, then stated again the terms of the proposed arrangement ; and that Ryerson then stated that he could procure the said loan, and that as soon as the property was sold, the money should be advanced to the purchaser, to be secured by mortgage on the property, on condition that the creditors then present would execute an agreement that, in proportion to their respective claims that should be satisfied out of moneys raised on the mortgage, they would be responsible to the mortgagor for any loss he might sustain on account of said loan, to which conditions the said creditors assented. That Pratt then accepted the said proposition, and it was agreed that the property should be sold under the said arrangement, and that, immediately after the sale, in order to secure the possession to Pratt, and a re-conveyance of the property as soon as the loan should be effected, L'Hommedieu should execute a proper instrument for the re-conveyance of the property to Pratt, and also a lease for the same ; and by consent the sale was then adjourned, to take place at Newton, on the 7th December, 1838.

The bill then states that, on that day, and for the purpose of carrying out the arrangement before stated, the said creditors of the Hamburgh company entered into articles of agreement among themselves (being the articles before stated.) The bill then states the sales by the sheriff, as before stated. That the property of the Hamburgh company, and the ore bed of the Clinton company, so sold, were worth, at a low cash valuation, \$100,000. That in November, 1838, Joseph E. Edsall and L'Hommedieu had each given a written appraisement of the said Clinton ore bed, estimating its value at \$50,000. That at the time of the sale there were persons present who were ready to bid a large amount, and particularly for the ore bed ; but



---

Hamburgh Manufacturing Co. v. Edsall.

---

they were informed by Joseph E. Edsall and L'Hommedieu and others interested, that the sale was made under an arrangement between the said company and the creditors, and in consequence thereof they were induced not to bid on the property. That the aggregate amount due to the said creditors of the Hamburgh company who signed the said agreement, was about \$17,000 ; that of that sum L'Hommedieu was a creditor of said Hamburgh company for about \$140. That Edsall held two mortgages on a part of the Hamburgh property, and a mortgage on the Clinton company's ore bed, and pretended to have a claim against the complainants, the Hamburgh company, for two or three thousand dollars, for expenses and services in procuring the charter of the said Hamburgh company, &c., but the items of said account he would never render to the said company, or to Pratt, and always insisted that the amount of his said claim should be allowed, without the production by him of any bill of particulars for the same, but which the complainants, the Hamburgh Manufacturing Company, and Pratt always refused to do, or to admit the justice of any such amount as said Edsall claimed. That Edsall was a large dealer with the complainants, the Hamburgh Manufacturing Company, and became largely indebted to them, and to an amount nearly if not quite sufficient to satisfy his mortgages, and any other just demand he had against the company. That at the time of said sale, the complainants, the Hamburgh Manufacturing Company, were in possession of the said property belonging to them, and were preparing for blast. That immediately after the sale, Pratt, being desirous to secure the possession of the property in order to carry on the business, urged upon L'Hommedieu and Edsall the immediate execution of the agreement to re-convey, and also of the said lease ; and with the view of ascertaining the amount of the accounts of the respective creditors of the Hamburgh company who had signed said agreement, had effected a settlement of their respective amounts with all or most of them, except said Joseph E. Edsall, whose claim remains unascertained.

The bill then states the lease from L'Hommedieu to Pratt, and the agreement between L'Hommedieu and Pratt for the conveyance of the property to Pratt, as before stated. That the

---

Hamburgh Manufacturing Co. v. Edsall.

---

said \$30,000, mentioned in the said agreement to convey, was only a nominal sum, named as sufficient to cover the objects contemplated by the said arrangement, to wit, to put Pratt in funds, to the amount of \$2000, to carry on the works and pay off all the debts; and as the amount of the debts had not been fully ascertained, it was thought best to borrow \$30,000, and use enough of it for the purposes aforesaid.

The bill states that the said writings were executed with the expectation, on the part of Pratt, that they would, in a few days, be canceled, as they were all based upon and entered into, on his part, relying upon the loan to be made by the said Ryerson; and that, with that expectation and understanding, the said creditors did, by their said agreement signed by them, agree to execute to the lender of the money their respective bonds, as stated in their said agreement.

The complainants further state that the \$1500 stipulated in the lease to be advanced by L'Hommedieu to Pratt, to put the furnace into blast, was inserted instead of the \$2000 contemplated in the agreement of the said creditors for that purpose, with the consent of Pratt; but that neither L'Hommedieu nor any of the said creditors advanced anything whatever to put the said furnace into blast. That Pratt went on with his own means to do so; and while going on with the said work, applied from time to time to L'Hommedieu, Edsall and Ryerson, for the completion of the said arrangement, and the loan of money to effect it; and was continually promised that the money should soon be advanced, and everything satisfactorily arranged, according to the understanding of the parties, until, at length, Ryerson told Pratt that the money would not be advanced.

The complainants further state that while Pratt was proceeding, as aforesaid, to put the furnace into blast, and after ascertaining that the arrangement made at the said sale would not be carried into effect, he made arrangements in New York for money sufficient to pay off the said creditors, and requested L'Hommedieu to go with him to New York, to have the papers executed; that while on his way to New York, in company with L'Hommedieu, he was arrested on a recognizance of bail, and confined at Newark.

---

Humburgh Manufacturing Co. v. Edsall.

---

The complainants state that they are informed and believe that while Pratt was thus in confinement, L'Hommedieu and Edsall called a meeting of the creditors who had signed the said agreement, and proposed that they should take possession of the property, and themselves carry on the business of the said company; that all the creditors, except L'Hommedieu and Edsall, declined doing so, and remonstrated against any such proceeding under such circumstances; but that L'Hommedieu and Edsall, notwithstanding, determined themselves to take possession of the property. That on or about June 10th, 1839, they went into the office on the premises, where all the books of the company were kept, they, or one of them, breaking through the windows, the door of the office being locked, and then went to the tenants who occupied the dwelling-houses on the property of the complainants, "The Hamburgh Manufacturing Company," about ten in number, and turned out of doors the families and furniture of such of them as would not agree to become tenants under them; and that in this way the said L'Hommedieu and Edsall took possession of the premises.

The bill further states that when L'Hommedieu and Edsall took possession as aforesaid, there was a large quantity of charcoal and of wood cut, and of ore raised, besides other personal property of various kinds, on the said premises, consisting of furniture belonging to the office, also mules, oxen, horses, wagons, carts, sleds, coal, implements for raising ore, cutting wood, and working the blast, owned by the complainants, "The Hamburgh Manufacturing Company," and Pratt, or in their possession, under lease and agreement with the owners thereof, all of which the said L'Hommedieu and Edsall took possession of and converted to their own use; and that ever since the said 10th of June, 1839, they have been in possession of the said property, and of the rents and profits thereof, and have cut and sold wood, and raised and sold ore, and have made two blasts on said premises, and are now in a third blast; and have, as the complainants are informed and believe, cleared out of the first blast upwards of \$15,000, and out of the second more than \$10,000, after paying all the expenses thereof; being more than sufficient to pay all the debts of the said Hamburgh company; and that the said L'Hommedieu and Edsall have rendered no



---

Hamburgh Manufacturing Co. v. Edsall.

---

account, but have refused to do so; and that the claims of the said creditors remain unsatisfied, except a few which L'Hommedieu and Edsall have purchased, at one-half, and some at one-quarter of the amount thereof.

The complainants further state that they have frequently, through Pratt, applied to L'Hommedieu and Edsall to account, &c., and to appropriate the proceeds, rents and profits, to pay off the said creditors of "The Hamburgh Manufacturing Company," according to the agreement under which L'Hommedieu purchased and took the sheriff's deed; and the balance, if any, to pay over to the complainants, some or one of them; and for L'Hommedieu to re-convey the premises to the complainants, some or one of them; the complainants offering, and now offering, if, on the taking of such account there should not be found funds sufficient in the said defendants' hands to pay off the said creditors, to advance enough to make up the deficiency.

The bill prays an account of all and every the said estate and effects of the complainants, "The Hamburgh Manufacturing Company" and Pratt, taken possession of by L'Hommedieu and Edsall, and of the rents, issues and profits of the said real estate; and that the said deed to L'Hommedieu may be declared a trust deed, and the rights and interests of the complainants under the same be declared and secured; and that an account may be taken of the respective debts due from the complainants, "The Hamburgh Manufacturing Company," to the said creditors, respectively; (they are all made defendants;) and that the same may be paid, under the direction of this court, out of the said rents, issues and profits; and if it shall appear that the rents, issues and profits, and other receipts of the said Edsall and L'Hommedieu, exceed the said debts, they may be directed to pay to the complainants such excess; and that L'Hommedieu and Edsall may surrender and convey the said premises to the complainants, or such person as they shall appoint, free from all encumbrances made by them, and deliver up to the complainants all title deeds, &c.; and that the complainants may have such further relief, or such other relief in the premises, as the circumstances of the case may require.

L'Hommedieu and Edsall put in their joint and several answer to the bill; the substance of which, so far as necessary to

---

Hamburgh Manufacturing Co. v. Edsall.

---

the consideration of the case, is as follows: They admit that Pratt made various efforts to prevent a sale of the real estate of "The Hamburgh Manufacturing Company," under the said executions against them, and procured adjournments of the sale from time to time; and that he may have made efforts to negotiate a loan upon the said property, to pay off the judgments and other debts against the said company; and may have procured searches of the title, and certificates of competent persons as to the value of the property; but what success he met with in his efforts, or what assurances he may have received, these defendants say they are ignorant.

They admit that on the 5th of December, 1838, the day the sale of the Clinton mine tract was to take place, Pratt came to Hamburgh in company with Aaron B. Nones; but say they are wholly ignorant whether Nones had authority or means to purchase the said property; and that if the facts were so, they were not disclosed by Nones or Pratt, either to these defendants or to any other persons, so far as they know and believe. They admit that they and a number of other creditors of the Hamburgh company were present to protect their interests; but deny that on that, or any other occasion, they told Pratt that they would undertake to raise money enough by mortgage upon the property, to appropriate \$2000 for the purpose of carrying on the business of the company, and to pay off all the creditors, or that they had any assurances from David Ryerson such as the complainants have represented in their bill, that he would or could procure a loan of \$30,000, or whatever sum, not exceeding that amount, might be required for the purposes aforesaid, but that said loan could only be obtained on condition that the property should be sold, and some person should become the purchaser of the said ore bed and the property of the Hamburgh company, or that as soon as the said loan could be effected, the said property should be re-conveyed to the Hamburgh company or Pratt, or that in the meantime the said property should continue in the hands of Pratt, or that at any other subsequent meeting of the said creditors, these defendants, or any other of the said creditors, to their knowledge, ever proposed any arrangement, or that any arrangement was at any time proposed, to the knowledge or belief of these defendants, by which any trust

---

Hamburgh Manufacturing Co. v. Edsall.

---

whatever was to be created in any person, in favor of Pratt or "The Hamburgh Manufacturing Company;" or that the sale of the Clinton mine tract was adjourned on the said 5th of December, upon any such arrangement or understanding with Pratt, or that on the next morning Ryerson stated in the presence of Pratt and these defendants and other creditors, that he could procure the said loan on the conditions in the bill mentioned, or on any other conditions, or that there was any assent of the creditors to any such conditions, or any agreement that a sale should be made under any such arrangement as the complainants have alleged, or that L'Hommedieu should purchase under any such agreement or arrangement, or should execute any re-conveyance or lease to Pratt, founded on any such agreement or arrangement.

They say that the sale of the Clinton mine tract, under execution in the hands of said sheriff against the Clinton company, having been adjourned from time to time, until the said 5th of December, and the whole of the real estate of the Hamburgh company being also advertised under executions in the hands of said sheriff against the Hamburgh company, and these defendants and the other creditors of the Hamburgh company deeming it important to the security of their claims against the Hamburgh company, that the Clinton mine tract, whence the Hamburgh company derived their principal supply of ore, should be purchased in for the benefit of the Hamburgh furnace, and the creditors of the said company despairing of Pratt's being able to raise funds or make any arrangement for the payment or security of their debts, and having large claims against the said Hamburgh company, sometime in November, and several weeks previous to the time appointed for the sale of the said mine tract, held a meeting for the purpose of consulting together as to the best means of securing their debts; and that it was then agreed among the said creditors, that if the said mine tract and the real estate of the Hamburgh company should be sold on the said executions, they would appoint one of their number to purchase the same, for the benefit of such of the creditors as should become parties to the agreement, in case no person should, at such sale, offer a sufficient sum to pay the encumbrances and secure the creditors; and that at that meeting,



---

Hamburgh Manufacturing Co. v. Edsall.

---

the creditors settled upon most of the principles of the articles of agreement afterwards executed on the 7th of December, and which is set out in the complainants' bill. They say that neither Pratt nor the Hamburgh company were known in the said arrangement, or had any part or interest in it, but that it was an arrangement determined upon and entered into by these defendants and the other creditors who became parties to it, solely on their own account and for their own protection and benefit, and induced solely by the belief that the said company and Pratt were utterly insolvent. That the debts and encumbrances then existing against the Hamburgh company, according to the best of the knowledge and belief of these defendants, exceeded \$30,000; and that the debts of the Clinton company which existed at the time as liens on the said mine tract exceeded \$10,000; and that, as the principal value of the Hamburgh property and of the said mine tract, depended upon its being all kept together, and used for the purpose of manufacturing iron, it became a matter of the last importance to the creditors to prevent it being sold in separate parcels, or for other purposes; as such an event must necessarily have resulted in a great sacrifice of the property, and consequently in a great and almost total loss to the creditors, the Hamburgh company and Pratt being without any other means to discharge the said debts, to the knowledge or belief of these defendants.

They say that at some one or more of the meetings of the creditors of the Hamburgh company, held previous to the sale, David Ryerson was present, and was consulted by some of said creditors as to the possibility, in case the property should be purchased for the benefit of the creditors by one of their number, of raising, by loan to be secured on the same, money sufficient to satisfy their claims, provided they would agree to indemnify the lender against all losses, should the property, on a sale thereafter to be made, not bring the amount; that Ryerson offered to make an effort to procure a loan of \$30,000 for that purpose, and expressed the hope that he should be able to effect such a loan, and did make efforts, as these defendants believe, to do so, but wholly without effect; but these defendants deny that he ever gave them, or the creditors, or Pratt, in their presence, or to their knowledge, any promise that he would, or

assurance that he could raise the said sum, or any other sum, upon the property and security aforesaid.

They admit that such articles of agreement by and between the subscribers thereto, creditors of the Hamburgh Company, as are set out in the complainants' bill, were made and executed between them, on the 7th of December, 1838, the day of the date thereof; but they deny that said agreement was made or executed under any agreement or arrangement between them and Pratt, or for the purpose of carrying out any arrangement or agreement between them, or in the expectation that the said sum of money would be immediately raised, or with the understanding that the said property was to be re-conveyed to Pratt, or that a lease was to be executed to him immediately after the sale, but that, on the contrary, the meaning and intent of the said agreement is fully and entirely expressed therein, and that it expresses all that was understood between the parties, as far as the knowledge or belief of these defendants extends.

They admit that L'Hommedieu became the purchaser of the Clinton mine tract, at the sheriff's sale thereof, for \$4041, subject to all prior encumbrances, and that, on the 14th of said December, the said sheriff sold all the real estate of the Hamburgh company, and that L'Hommedieu became the purchaser thereof, for \$285, subject to all prior encumbrances, and that deeds were delivered, by the sheriff, to L'Hommedieu.

L'Hommedieu says he bought the Clinton mine tract and the Hamburgh property by virtue of the powers and instructions, and for the sole purposes set forth in the said agreement of December 7th, and for no other purpose whatever; that he acted as the agent or trustee of the creditors, as therein particularly named, and for none others; that there was not any understanding or agreement between himself and Pratt, or between himself and any other person or persons, that he was to hold the property, or any part of it, in trust for Pratt or the Hamburgh company, or for their, or either of their use or benefit, or for any other purposes than those expressed in the said articles of agreement.

They deny that the Hamburgh property and the Clinton ore bed were worth \$100,000, or that there were any person or persons present at the sale or sales aforesaid, to the knowledge or

---

Hamburgh Manufacturing Co. v. Edsall.

---

belief of these defendants, who were ready to bid a large amount, either for the ore bed or for the Hamburgh property, and were prevented from bidding in consequence of the information of the arrangement among the creditors; but they say that, at the time of the said sales, many of the creditors doubted the propriety of buying in the property for the amount of the encumbrances, and considered its utmost value below \$30,000; and that these defendants and the other creditors were then, and since have been willing to sell the whole property, including the mine, for that sum. That since the said sales, they have offered the whole property to Pratt for \$29,000, though they had expended \$2000 on it; and that they would be glad now to sell the property for \$30,000; and that they believe that the full value of the property, subject to the encumbrances and debts embraced in the said agreement, was given for it; and as to the ore mine tract, they say it was bid up to within one dollar of what it was struck off for, by Joseph H. Pettis, secretary of the Hamburgh company, as these defendants believe.

They admit that sometime previous to the sale of the Clinton mine tract, they gave some such certificates as to its value as the complainants have charged; that Pratt called on them, on one occasion, when he was making efforts to borrow money on the property, and represented to them that he had had the ore bed examined by scientific miners, who had bored the ridge throughout, and found the bed inexhaustible; that from these representations, not having much personal knowledge of the matter themselves, and supposing Pratt's representations of the extent of the ore to be true, and knowing that ore could then be raised from the mine at fifty cents a ton, they signed the said certificates; but that they soon after ascertained that said representations were untrue—that the said ore was far from being so extensive, and that the same is now so far exhausted, that for the ore they have recently procured from that mine, they have been obliged to pay at least three dollars a ton.

Edsall says, that at the time of the execution of the said agreement, he held two mortgages on part of the real estate of the Hamburgh company, and a mortgage on the said Clinton ore mine; that the mortgages on the Hamburgh property, with interest, then amounted to about \$6500, and that he had a



---

Hamburgh Manufacturing Co. v. Edsall.

---

claim against the Hamburgh company of about \$3000, but he denies that the said claim was for services and expenses in procuring the charter of the company, or that he ever refused to furnish to the said company, or to Pratt, the particulars of said account, but says that the said claim was for coal, wood and other goods and personal property sold and delivered by him to said company, and for work and labor done and money advanced to and for the use of said company, at their request; and that the same was admitted by Pratt, in an agreement of November 29th, 1837, as a valid and existing debt due from said company, and set down as such by Pratt's consent, among the debts to be secured by a mortgage to Abner Jones; and he denies that he ever was indebted to the said company, or that he ever bought any ore of the said company, or that they had or have any just account or demand against him, by way of offset, as is alleged in the bill.

These defendants admit that they have purchased up, and taken an assignment of, debts due from the Hamburgh company, as stated in the bill; and that they now hold a large amount of claims against said company, secured by the agreement of the creditors, before referred to; that, including the mortgages held by the defendant Edsall, and the Sharp mortgage assigned to Edsall, the whole amount of the claims of these defendants, existing at the time of the said agreement and purchased since, together with the purchase money paid for the Clinton mine tract, is \$32,476.51, as near as they can at present ascertain; and they admit that there are yet some outstanding claims embraced in the provisions of the said agreement, the amount of which they do not precisely know, some small amount of which may have been purchased up by Pratt and Nones.

They admit that, at the time of the sale, the Hamburgh company were in possession of the property belonging to that company, but deny that they were then at work preparing for a blast, and say they had suspended their operations, and the whole property was lying idle, and nearly unoccupied, and had been so for months.

The defendant L'Hommedieu denies that he was under any obligation, by virtue of anything contained in the agreement

---

Hamburgh Manufacturing Co. v. Edsall.

---

of the creditors of the Hamburgh company, under which he was appointed their trustee, or by virtue of any arrangement or understanding had with Pratt previous thereto, or at the time of the execution of the said agreement, to make any lease or enter into any articles for the sale of the said property to Pratt, or that Pratt called upon him repeatedly to do so, as is stated in the bill ; but he says that, upon a conference with the creditors, and at the solicitation of Pratt, and under the influence of the representations made by him that he could yet raise money to carry on the works and pay off the creditors of the company, a majority of the said creditors advised this defendant to execute a lease of the property to Pratt, and to enter into a contract for the sale of the premises to him, for \$30,000, and that a lease and contract of sale were accordingly made and delivered to Pratt, as the same are set out at large in the complainants' bill ; and he denies that the said sum was merely nominal, and named as being more than sufficient to cover the objects of starting the furnace and paying the debts, but that it was the sum for which the creditors and he were willing to sell the property to him, though below the actual amount of the claims by about \$2000.

L'Hommedieu denies that the lease and agreement were executed with the expectation of their being canceled, or that they were based on any expectation of a loan to be effected by or through Ryerson, but says that, at the time they were executed, it was distinctly known by the parties that a loan could not be obtained through Ryerson ; but Pratt insisted that if he could get such lease and agreement, it would enable him to go on with the business, and finally complete the purchase ; and the creditors, not being willing to attempt to carry on the works on their own account, preferred any plan which appeared to promise success and put the works in operation, rather than abandon them to ruin, and that the covenants binding Pratt to go on with diligence, under penalty of forfeiture, were inserted to secure that end.

These defendants say that, after the making of said lease and agreement, Pratt left Hamburgh, and furnished no means, nor did anything towards putting the furnace in operation, but suffered the property to be idle, and everything to go to ruin.

---

Hamburgh Manufacturing Co. v. Edsall.

---

That the furnace dam was swept away, and no efficient efforts or preparations made to repair it. They deny that Pratt applied to them or either of them, for means to carry on the works; nor was he kept in suspense by these defendants; nor did he get up any ore, or put the furnace in blast, or procure wood or ore during any time after he received said lease.

L'Hommedieu admits that in April, after the lease and agreement, Pratt being in Hamburgh, and this defendant being desirous of satisfying himself whether there was any probability that Pratt would be able to go on, or comply with the agreement, he started with Pratt for New York, to see the persons who Pratt alleged proposed or were willing to advance him money; and that on the way Pratt was arrested, and was detained at Jersey City; and this defendant went over to New York with a letter from Pratt to his friends. That this defendant delivered the letter to the the persons to whom it was addressed, one of whom, he thinks, was Abner Jones, but they refused to do anything for Pratt, and he was taken to Newark jail, and in August following, took the benefit of the insolvent laws, making an assignment to Freeman and Jones, in which are embraced about 600 shares of Hamburgh stock, and the said lease, and from 600 to 1200 shares of the Clinton stock.

These defendants say that from the time of the lease to that of the arrest, the property was unoccupied, the dam, in the meantime, mostly carried away, &c., and the whole property rapidly going to decay; and the creditors and these defendants apprehended that the whole works would be ruined, and at the instance of some of them, D. Haines and R. Hamilton went to Newark to see Pratt, and learn his views, and what he expected to do. That Pratt told them he had given up all idea of being able to do anything with the property, that he relinquished all claim to the same, that the creditors might take possession, and might as well have done so before, as he had abandoned all idea of doing anything in the matter for some time previous.

These defendants admit they called a meeting of the creditors, after Pratt had been confined in jail, and that most of them met, and that it was proposed they should put the works in repair and go on; but the majority objected to engage in it,



---

Hamburgh Manufacturing Co. v. Edsall.

---

and many of them declared they would sooner lose their claim than encounter the risk ; and it was then proposed that a few of the creditors should join and carry on the business ; and it was finally agreed that some such arrangement should be effected, if it could be brought about.

And these defendants deny that the creditors, except said defendants, opposed the possession of the property being taken out of regard to any supposed rights of Pratt, who had forfeited all right under his lease, by neglecting to proceed to put the property in order and carry on the works, and by abandoning the same to ruin, in express violation of the covenants of the lease.

They say that all prospects of Pratt's doing anything being ended, the said Edsall having a mortgage on the furnace tract, and being a holder, to a very large amount, of the claims under which the property had been sold, entered into and took peaceable possession of the property, about the time in the bill stated, in his own right as mortgagee ; and the defendant L'Homme-dieu, afterwards, as purchaser at said sheriff's sale and trustee for the creditors, and as holder of the Jones mortgage, entered, peaceably, on the premises not included in the mortgage of Edsall, and also of the Clinton mine ; and that the defendants afterwards agreed to unite in putting the property in repair, and the furnace in blast, and in carrying on the business. They deny that the creditors objected to their taking possession, but insist that, as far as they know, they acted in conformity with the wishes and desires of said creditors. They deny turning out tenants of Pratt, or taking such forcible possession as the bill charges, but say that the premises were abandoned by Pratt ; that he had forfeited his right under the lease, and had expressly declared to the accredited agents of the creditors, that he relinquished all pretensions of claim to the property.

They deny that, when they took possession, there was a large quantity of charcoal, wood, ore, or personal property of various descriptions, or mules, &c., belonging to complainants, or any of them, on the same, but say that all the personal property which had been owned by the Hamburgh company had been before sold by the sheriff and constables, and that most of the teams, &c., and other property had been bought by Edsall ;

---

Hamburgh Manufacturing Co. v. Edsall.

---

and since being in possession, they have obtained their ore for the blasts from the mine, and have cut some wood on the premises ; but most of the wood and coal they have got from lands of Edsall, or other of the furnace property, or of other persons. They admit they have now on hand some pig-iron, coal, ore, wood, mules, &c. ; but deny that any of them belong to the company, or Pratt, or were procured by their means, but say they have, ever since being in possession, carried on the business wholly with their own means ; and that, at their own expense, they rebuilt the dam, at an expense of \$2500, put up a coal-house, rebuilt part of the flume, and made other extensive erections and repairs, and bought all the necessary personal property to enable them to carry on the works, and keep them in operation.

They deny that they have cleared from the first blast upwards of \$15,000, and out of the second more than \$10,000 ; but say that the proceeds of the business have not, as yet, met the outlays and expenses of carrying it on, and paid a fair compensation to the defendants for their trouble and investments.

They deny that they ever have refused to account with the creditors of the Hamburgh company, or that they have ever been called on to account by them ; but say they are ready, and have always been ready to account with the said creditors, under the said agreement of December 7th, 1838.

They deny that Pratt has frequently applied to them to account, as the complainants state in their bill, but admit that in July last, (the answer was filed in March, 1842,) Pratt called on Edsall and wanted him to exhibit an account of their business, as trustee and agent of said Pratt or the Hamburgh company, and that Edsall told Pratt that neither he nor the Hamburgh company had anything to do with the property or business, or had any right to any account whatever ; and that Pratt, about the same time, called on L'Hommedieu, and made some like demand, but he, L'Hommedieu, being sick, referred him to Edsall.

They deny that they took possession fraudulently, or in violation of any agreement or lease, or against the express wish of the creditors ; and deny that the complainants have any interest in or claim to said property, or any part thereof.

---

Hamburgh Manufacturing Co. v. Edsall.

---

The defendant Daniel Haines also put in his answer. He admits that the sales were adjourned from time to time at the request of Pratt, who alleged he was negotiating a loan to pay the executions. That while said real estate was advertised, some of the creditors of the Hamburgh company became fearful it might be sold to their prejudice, and their claims be lost, as a few of the large creditors might unite to the injury of the smaller ones; and they suggested that all the creditors should unite in the purchase of the property, for their common benefit. To this some assented, and some declined unless the works could be carried on without their embarking in making iron. It was then suggested that the premises might be rented out, or perhaps sold at private sale, and the loss of a large part of the claims prevented; and while the matter was a subject of discussion and reflection among the creditors, some person, not distinctly recollected, but he thinks Brown and Lewis, or one of them, came to the office of this defendant, and stated that Pratt, or some one he would appoint, would probably be lessee, if the creditors should buy the premises; and afterwards Pratt, or some one on his behalf, not now recollected who, asked this defendant if an arrangement could not be made, by which the creditors should buy the property and lease it to Pratt. This defendant said he thought it might be done. The sale, however, was adjourned; but from these suggestions, the creditors pretty generally concluded that it would be to their advantage to buy the property, particularly as they considered that the value of the Hamburgh property would be greatly increased by the addition of the Clinton ore bed; the Hamburgh ore bed being then esteemed of little value. But the terms of purchase, and what disposition should be made of the property, was left undetermined, and was the subject of conversation from time to time, for several weeks before the sale.

On the 5th of December, 1838, the day fixed for the sale of the Clinton property, on this defendant's being informed that the sale was adjourned to the 6th, and that some arrangement between the said creditors was likely to be made, and that his aid was desired, he left Newton and went to Hamburgh. The whole business was then discussed, and David Ryerson informed the creditors, in the hearing of this defendant, that he had



---

Hamburgh Manufacturing Co. v. Edsall.

---

come there to aid the creditors, and that he would make the attempt to raise, by loan, the money to buy the property and satisfy the liens on it, and \$30,000 was thought sufficient. Ryerson stated openly to the creditors, and he believes in the hearing of Pratt, or of some of the persons acting with him, that he did not know that he could raise all the money; that he could, perhaps, furnish part himself, and would go to New York and see what he could do there; that it might be necessary for him to go to Pennsylvania for it, and that he would do all in his power to effect the loan. It was then again suggested that Pratt, or some one named by him, would take a lease, to which the creditors generally assented, if they became the purchasers, and if they could agree on the terms of the lease. It was then also proposed that Pratt should have the privilege of buying the property, on payment to the creditors of their claims and expenses, whereupon a negotiation was entered into between some of said creditors and Pratt, as to the terms on which he would lease the premises, and to give time for consideration, and a proper understanding of the matter, the sale of the Clinton property was adjourned to the 7th of December, at Newton. Pratt and many of said creditors went to Newton, and the terms on which the said creditors would become the purchasers, and how they should dispose of the property, were fully discussed among the said creditors. There was a variety of propositions, and a diversity of opinions, occupying all night, and to twelve o'clock next day; this defendant and Mr. Hamilton acting as counsel for the said creditors. The result was the agreement between the said creditors, dated December 7th, 1838, stated in the complainants' bill. The terms of the said agreement were settled by the said creditors among themselves, and not between them and Pratt.

Pratt was not, to his knowledge and recollection, present with the said creditors during the said negotiation among themselves, and some of the creditors refused to make any agreement with him respecting the property. But this defendant admits it was generally expected, and believed that Pratt would become the lessee, or, as a creditor, said Capt. Pratt was to have the refusal of the lease, on the terms agreed on by the said agreement among the creditors; and in that expectation, Pratt was oc-

---

Hamburgh Manufacturing Co. v. Edsall.

---

casionally consulted as to the terms of the said agreement between the said creditors, which was to contain the terms of any future lease; and Pratt made several suggestions in relation to it, he and his counsel occupying another room in the same house.

That this defendant signed the said agreement as a creditor; his claim was then about \$113, afterwards reduced to \$40, on an account stated January 4th, 1839. That at the time of making the said agreement, the said company were further indebted to him as assignee of Mr. Longwell, in \$85, and also in \$126, the amount of a claim of Henry Darrah against said company, assigned to him, which claims were repeatedly recognized by the said company, and their president, Pratt.

That he acted also as attorney for six other creditors of the company, (naming them,) John L. Adams, since deceased, being one of them, and he also signed said agreement in their behalf; and thereby this defendant and those for whom he acted became interested in the said real estate afterwards purchased by L'Hommedieu, under the authority and instructions of the said agreement. He admits that the other parties signed the said agreement, as in the bill is stated, and thereby became interested in the said real estate so bought by L'Hommedieu. He does not know what was the expectation of the said creditors about the money being raised immediately, and their debts paid; but for himself, as well as he can now recollect, he may have hoped that the money would soon be raised, but did not expect that more would be raised than to pay off the purchase money and encumbrances.

He admits that, pursuant to the terms of said agreement, L'Hommedieu, as trustee of the said creditors, and not of Pratt, bought the Clinton property for \$4041. That Nones was present at the sale, but for what purpose he came, and what money he had with him, or whether he or any other person would have bid more, under any circumstances, or whether any person was deterred or hindered from bidding, by any person, by persuasion, threats or otherwise, he does not know; but some two or more persons besides L'Hommedieu bid at the sale.

He admits that L'Hommedieu, as such trustee of the said creditors, and under the said agreement, afterwards bought at

---

Hamburgh Manufacturing Co. v. Edsall.

---

the sheriff's sale, the real estate of the Hamburgh company. That the property so bought by L'Hommedieu was and is very valuable ; but as the value depends on the extent of the ore-beds and many adventitious circumstances, to fix a certain value might be regarded as speculation. But he was and still is willing to relinquish all his claim to and interest in the property, on being paid his claim ; and he believes most, if not all the said creditors are like minded. He does not know, and has no certain means of ascertaining the amount of the debts of the Hamburgh company ; but it was understood among said creditors, and he thinks by the officers of said company, that the Hamburgh company's debts, together with the purchase money of the Clinton property, and the prior encumbrances against both properties, would amount to between \$28,000 and \$30,000 ; and he has since seen a statement, supposed to be correct, amounting to more than \$32,000.

Soon after the sale, at the request of L'Hommedieu, he prepared a lease to Pratt, the terms of which were intended to be in conformity with the agreement of the said creditors, and the instructions therein to L'Hommedieu. There was not, to his recollection and belief, any unnecessary delay therein ; but on one or more occasions, some of the creditors having urged the settlement of all the claims, and particularly of Edsall's, before any lease should be executed, he stated that to Pratt, and urged the speedy settlement of all the accounts, and that of Edsall among the rest ; and he admits that Pratt called on him several times, about the said lease, and perhaps urged its execution ; but thinks Pratt called rather for the purpose of settling the terms of the lease and the articles for the sale of the said premises, than of urging their execution ; and Pratt saw and knew that L'Hommedieu, the trustee, was obliged frequently to confer with the said creditors about the terms of said lease and of said agreement, and that much time was necessarily consumed in the preparation of them ; and this defendant thinks that after the drafts of said lease and articles of sale were made, one or both were taken by Pratt, to submit to his counsel ; and that he returned the same with some written observations and suggestions on them by James Spear, of Pater-son, who was consulted by Pratt.



---

Hamburgh Manufacturing Co. v. Edsall.

---

He admits the lease and articles of agreement were the same as stated in the bill. That Pratt, or some person with or under him, made the necessary arrangements to carry on the works ; but on what funds or credit he cannot state ; nor does he know whether any advances were made by L'Hommedieu under the said agreement. That no money was raised by Ryerson on the said property ; but he has been informed by Ryerson that he made great exertions to do so, and failed. That this defendant, at the request of the said trustee and of some of the creditors, applied to several capitalists for a loan, but they all declined ; and he believes every reasonable effort was made without success. That L'Hommedieu and Pratt set out to go to New York to make some arrangements about the said property, and that Pratt was arrested, &c.

He was present at a meeting of some of the creditors at Hamburgh, to consider what disposition should be made of the said real estate, Pratt having, as they believed, failed to fulfill the terms of said lease, and forfeited the same, the dam and works being in a state of dilapidation, and exposed to great danger ; and some one there proposed that the creditors should take possession, and put the works in operation. Some objected, on different grounds ; but all the creditors, except a few, objected to involve themselves in the hazard of that business, and some said they would rather lose their claims ; and he thinks Edsall said all the creditors would be too many, but with four or five he could name the business might be driven with advantage ; and this defendant stated to said creditors that whatever might be their right to the possession, it would not be liberal to Pratt, in his then unhappy situation ; and thereupon the said creditors requested this defendant, who was going to Trenton, to call on Pratt, and ascertain his views and prospects in relation to the performing his contracts for the said property. That on his return from Trenton, being in company with Robert Hamilton, he invited him to go with him to see Pratt, and they went ; and this defendant stated to Pratt that the creditors were anxious to know what he meant to do with the said property, and that it needed attention, and that some of the creditors had proposed to take possession and carry on the works. Pratt said he was willing the creditors should take possession, and wished they

---

Hamburgh Manufacturing Co. v. Edsall.

---

had done so long before ; that he had given up all hope of doing anything with it, and that he freely gave up all his right to it, and hoped the creditors would be able to make their money out of it. This defendant told the creditors, at Hamburgh, of the result of his interview with Pratt ; but he does not now recollect of any further proposition being made to take possession of the property ; but about that time, or a few days after, he heard that Edsall was in possession of the whole, or some part of it, claiming it as mortgagee in possession ; and, soon after, he heard that L'Hommedieu had entered into partnership with Edsall ; and he was afterwards told by L'Hommedieu that it was so. And this defendant then reminded L'Hommedieu, that he was the trustee of the creditors, and might and perhaps would be held responsible for the use of the property ; and suggested to him the propriety of so keeping his books of account as to be able to render a satisfactory account, if required. He has no knowledge of the manner or precise time of Edsall and L'Hommedieu, or either of them, taking possession ; nor of the personal property then on the premises ; nor what profits have been realized from the furnace, except that during the first blast made by Edsall and L'Hommedieu, he heard them say their business was very profitable, and he has since heard them say that their second blast was not profitable.

He says that after Pratt was liberated, he came several times to Hamburgh, with divers persons who, he said, were desirous of buying the property and works, and on those occasions the creditors, or such of them as could conveniently be assembled, were called together, and propositions were made by Pratt for the purchase ; and on some or all those occasions, the creditors so assembled have stated to Pratt that they would ask no more than to be paid their debts and expenses ; and that if he would negotiate a sale he could have the benefit of all he could get over ; and at other times the creditors, or some of them, have offered to make, for his benefit, a liberal discount from their claims, if he could effect a sale ; and that in all such negotiations, Pratt did not, to the knowledge or belief of this defendant, assert any right or interest in the premises ; but, as this defendant then thought and still thinks, relied entirely on the liberality of the said creditors.

---

Hamburgh Manufacturing Co. v. Edsall.

---

And this defendant submits himself to the judgment of the court; and if on the whole case, a trust in L'Hommedieu for the use of Pratt shall result and be decreed, he prays an account, and that L'Hommedieu, as trustee of the said creditors, may account for the rents and profits of the furnace and real estate, and pay to the said creditors the amounts due them, by a short day; or that the premises may be sold, and the said creditors paid out of the proceeds, in their order of preference.

The common replications were put in.

January 20th, 1843, decree *pro confesso*, was entered against all the defendants except Elias L'Hommedieu, Joseph E. Edsall and Daniel Haines.

The substance of the testimony is as follows :

Aaron B. Nones.—He believes the ore-bed was advertised to be sold on the 5th of December, 1838; Joseph E. Edsall and Elias L'Hommedieu were present on that day; Edward W. Pratt was also there; also Daniel Haines, Robert A. Linn, Robert Lewis and Joseph M. Brown; the sale did not take place on that day, but was adourned; he understood from Edsall and L'Hommedieu and several other creditors, that the sale was adjourned in consequence of an arrangement entered into between the creditors and Pratt, respecting the sale of the property; he made no secret of why he went; it was generally known and understood there, why he did go; he was asked by several if he came to purchase the property, and he answered "yes;" there was, on the day the sale was advertised to take place, a meeting of persons, said to be the creditors of the Hamburgh company and Pratt, of considerable duration; Edsall and L'Hommedieu were present with the creditors; during that meeting, witness and others were waiting in expectation of the sale; he understood it to be a meeting confined to Pratt and the creditors; immediately after that meeting broke up, Pratt submitted to witness a proposition in writing, said to have been made to him at that meeting; witness saw Pratt come out of the room where the meeting was held, with the paper in his hand; after the meeting broke up, witness had a conversation with Edsall, L'Hommedieu, and several of the other creditors, respecting what took place at that meeting; Edsall and L'Hommedieu told witness that they had an understanding with Pratt respect-



---

Hamburgh Manufacturing Co. v. Edsall.

---

ing the sale of the property ; that the sale had been adjourned for a day or two, to give Pratt an opportunity of reflecting upon the proposition ; witness thinks the paper Pratt handed him was in the handwriting of Daniel Haines ; he does not know what has become of that paper ; he took a copy of it on the same day. [Being shown a paper marked Exhibit E on the part of the complainants, he says]—That is an exact copy of the original paper handed to him by Pratt ; it is in witness' handwriting ; he had a conversation with Edsall, L'Hommedieu, and several others, respecting the contents of that paper ; he stated prior to the sale, and it was known that if an arrangement was made between the creditors and Pratt, witness would not bid at the sale ; he thinks it was two days after that meeting of the creditors, that the ore-bed was sold ; and before the sale of the mine tract, or ore-bed, he distinctly understood that an arrangement had been entered into between Pratt and the creditors, by which L'Hommedieu was to purchase the ore-bed ; he understood this from Edsall, L'Hommedieu, and others ; it was in consequence of that arrangement that witness did not bid on the property ; he estimated the property to be worth \$100,000 ; he had conversed with Edsall and L'Hommedieu respecting its value, and in making the estimate, relied more particularly upon what Edsall told him, than what any one else told him ; when the sheriff sold the ore-bed, Joseph H. Pettis, of New York, was present, and, witness thinks, bid upon it ; he does not know why Pettis commenced bidding, but while he was bidding, witness went to him and told him it was foolish for him to bid, for an arrangement had been made with the creditors, and he, Pettis, knew what the arrangement was ; witness interfered and Pettis stopped bidding ; recollects Pratt's calling Pettis out and speaking to him respecting his bidding, and thinks Edsall and L'Hommedieu were present ; that is his impression ; the amount of what Pratt said, was, that Pettis knew what the arrangement was, and Pettis' bidding was only hurting Pratt ; at a subsequent day of the same month, the Hamburgh property was sold, and all was sold under the same understanding ; recollects, while he was up there, hearing about a loan for \$30,000, to be made on the property ; understood distinctly from Edsall, L'Hommedieu, and others, that the

---

Hamburgh Manufacturing Co. v. Edsall.

---

property was to be sold, and L'Hommedieu was to buy it, in order to perfect the title and enable him to make a mortgage; the sum stated to witness was \$30,000, which sum, it was said, would be sufficient to pay off the debts of the company, and to give Pratt \$2000 with which to carry on the works; the property was to remain in possession of Pratt, and after the debts were paid, was to be re-conveyed to Pratt; witness saw David Ryerson there, and heard him speak about this loan, but does not remember that it was in the presence of Edsall and L'Hommedieu; he heard Ryerson speak of it the same afternoon the arrangement was made between the creditors and Pratt; Ryerson confirmed to witness what he had heard from others, that Ryerson was either to loan, or procure a loan of \$30,000; witness has had conversation with Edsall since the time above spoken of; he understood Edsall then, as he had always understood him, that when Pratt complied with the lease, the property was to revert to him; recollects distinctly of having heard from Mr. Haines, Edsall, and several other of the creditors, that the reason why the clause for the lease to Pratt was not inserted in the agreement, was because it would show a collusion between Pratt and the creditors to the agreement, and vitiate the sale; knows that Pratt requested them to execute an agreement to give him a lease and the right of redemption, prior to the sale, and they declined for the reasons witness has stated.

Cross-examined.—When he went to attend the sale, he had about eleven or twelve thousand dollars with him, and authority to draw for as much more as he wanted; does not know that he could state the amount nearer; does not know whether Pratt owed witness' brother anything at that time; believes Pratt owes his brother since that time; does not know the precise amount, understands it is large; he presumes the reason why Edsall and L'Hommedieu stated to him the object of adjourning the sale was, because they, as well as others, had heard and knew the object of his being there, as it was talked of, he believes, in the room among the creditors; they each stated it to witness, but whether they were both together at the time, witness cannot say; others also stated to witness what had been agreed upon at that meeting; he thinks Mr. Haines

---

Hamburgh Manufacturing Co. v. Edsall.

---

told him the same thing; heard it from Mr. Brown also; and thinks Mr. Holcombe told him the same thing; in conversation with Edsall and L'Hommedieu and Holcombe, and several other creditors whose names witness did not know, who said it was a first-rate arrangement for Pratt, witness said he would not bid; Pratt was present at some of the conversations; Pettis bid on the property, but whether to an amount exceeding the executions, witness cannot say; his impression is, he did not; at the sale, Pratt called Pettis apart from the place where they were selling; at that time L'Hommedieu was near enough to make a bid; we were all within a few feet of each other, and he supposes Edsall and L'Hommedieu heard what Pratt said to Pettis, as witness heard it; after the adjournment of the meeting of creditors at Hamburgh, Edsall and L'Hommedieu stated the particulars of the loan, and again, at Newton, Mr. David Ryerson told witness about the loan; Pratt was present at the time.

Direct examination.—Witness distinctly understood at the time, that L'Hommedieu was to purchase the property for the benefit of Pratt and the creditors, and to perfect the title in L'Hommedieu; he was prevented from purchasing the property on account of that understanding, and should have purchased it if it had not been for that understanding.

Franklin Holcombe, for the complainants.—Was employed and connected with the Hamburgh company a portion of the year 1838, as agent for the company; was living at Hamburgh in 1838, when the sheriff advertised the ore-bed for sale, and was present at the public house where the property was advertised to be sold, when the meeting of the creditors was held there, and saw Pratt there, Aaron B. Nones, Elias L'Hommedieu, Joseph E. Edsall, Brown, and other creditors of the company; the sale was adjourned from Hamburgh to Newton for a day or two; understood Nones had come there to be a bidder at the sale; so far as witness understood, it seemed to be known that Nones was there for that purpose; understood Pratt and the creditors were about effecting an arrangement, and that was why the sale was postponed; at the time of the adjournment to Newton, witness understood that a loan was to be obtained on the property, and a lease was to be given to Pratt; understood Pratt



---

Hamburgh Manufacturing Co. v. Edsall.

---

was to have a right of redemption of the property, to be inserted in an article ; that L'Hommedieu was to be the purchaser ; the amount of loan talked of was \$30,000, or so much less as the debts of the company should prove to be ; understood L'Hommedieu was to purchase the property in trust, for the purposes mentioned ; the facts witness has mentioned were generally talked of among the creditors, Brown, Robert Lewis, Pratt, Edsall, Henry J. Simpson, William Simpson, Francis Hamilton ; he had no conversations direct with L'Hommedieu on the subject, but heard him make some statements on the subject ; L'Hommedieu stated he had agreed to give a lease to Pratt for the property ; witness has no strong, distinct recollection of it, but his impression is, he saw Edsall in conversation with Nones ; witness was present at the sale at Newton, a day or two afterwards, and understood the sale took place on the terms he had heard of at Hamburgh ; he had no conversation with L'Hommedieu on the subject, but had considerable conversation with Edsall, at Newton, at which Edsall stated to witness the understanding under which the property was to be sold, and that Pratt had consented to the sale on the terms talked of ; Edsall stated that he and some of the creditors preferred giving the lease to witness, because he was practically better acquainted with the business than Pratt was ; Edsall afterwards said, that on consultation with the creditors, his, Edsall's, proposition was rejected, and Pratt's name put in the lease ; witness understood the principal object had in view in selling, was to secure their claims, by uniting and perfecting the two titles in one person ; witness means by the two titles, the Hamburgh and Clinton companies ; the ore-bed belonged to the Clinton company, but the Hamburgh company derived their ore from it ; he does not know that he had any distinct conversation with Edsall, as to who was to make the loan, but that was a matter generally understood ; witness understood the loan was promised ; Ryerson said, in witness' presence, he would undertake to procure the loan, if the title could be perfected in one person ; he said the money was to be secured by bond and mortgage on the property ; the creditors were to unite, in proportion to their shares, in that bond, to guaranty the payment of the money ; witness understood this arrangement prevented Nones from

---

Hamburgh Manufacturing Co. v. Edsall.

---

bidding at the sale; it was considered that if there was any written agreement between Pratt and the creditors, prior to the sale, it would vitiate the sale; it was pressed on the part of Pratt, to have the agreement executed previous to the sale; witness supposes Pratt to have relied on their verbal promises, and on their honor; Pratt requested witness, a very few minutes before the sale, to go and get from the creditors a renewal of their promises, and they began crying the sale before witness had seen them all; he spoke to Joseph M. Brown and William Simpson, when they commenced crying the sale, and witness desisted going to any more; Brown said the agreement with Pratt should certainly be carried into effect; it was the understanding that the Hamburgh company should go on and settle with the creditors, in order to ascertain the amount of the respective debts; witness and Pratt went on with several of the creditors to ascertain the amount of the respective debts; he believes that Pratt, in the company's office, in the presence of witness, did call on Edsall for his account; there was considerable talk about Edsall's account; he said Horace, his son, was making it out; he never rendered his account, to witness' knowledge; he said Horace had made it out up to some particular date, and he wanted it examined and passed upon up to that date; witness thinks Pratt waited at Hamburgh some days for the purpose of getting Edsall's account; thinks the clerk of the company was sent to Edsall to get his account, but cannot say how often; the Hamburgh company had a store on their premises, where they sold dry goods, groceries, &c.; Edsall had a running account with the company for two or three years; he purchased a pretty considerable quantity of iron from the company; also a pretty good account for store goods; he was in the habit of giving orders on the store; on one of the company ledgers the account against Edsall, witness thinks, was something like \$1000; on another ledger there should be an account for a boat load of iron, twenty-five or twenty-seven tons; the iron must have been worth about \$30 per ton; there were other charges against him on that ledger; there was another account for iron against Edsall, which should be upon that ledger, for about seventy or eighty tons; Edsall had other iron, at one time about fifty-three or fifty-five tons; knows the

---

Hamburgh Manufacturing Co. v. Edsall.

---

fact of Edsall and L'Hommedieu taking possession of the property of the Hamburgh company; recollects Pettis' bidding for the ore bed; did not hear L'Hommedieu and Edsall say anything to Pettis about his bidding, but Edsall requested witness to go to Pettis and stop his bidding; and also requested Pratt to go to Pettis, and Pratt did go and stop his bidding.

Cross-examined.—His impression is, Pettis bid the property up to an amount exceeding the two executions; he is under the impression there were but two bidders, Pettis and L'Hommedieu; from information, he should say Edsall furnished the principal supply of coal for the first blast the company made, and furnished some wood; has heard it said he furnished the company with one team and one wagon, a three-horse team; the company got grain and flour and feed at his mill; the company never made out their account in full against Edsall, to witness' knowledge.

Direct examination.—At Newton, the evening before the sale, Edsall proposed an arrangement to have L'Hommedieu bid off the property without any arrangement at all as to the said sale, and to have three or four join in the arrangement; and requested witness to communicate it to Pratt, and see if he would go into it; said the object was to transfer the property and cut off all the other claims; Pratt was to come in for a share; the arrangement was to be effected by breaking up the other arrangement; L'Hommedieu called witness aside, and asked him if Edsall had made a certain proposition to him, that he thought very well of the proposition and he was willing to go into the arrangement; witness started to communicate it to Pratt, and found he had gone to lawyer Thomson's; and witness placed himself in a situation by which he supposed he should see him, but missed him, and soon after saw Edsall, who said to witness, I thought you said you'd see Pratt; I have seen him and spoken to him, supposing you had communicated to him; the captain said he'd think of it, but did not receive the proposition very favorably.

Cross-examination resumed.—The proposition of Edsall was, substantially, that four were to join in the purchase; on the 24th September, 1838, there was a sale of the personal property of the Hamburgh company, consisting of teams, wagons, wood,



---

Hamburgh Manufacturing Co. v. Edsall.

---

charcoal, &c., necessary to carry on the furnace, the furnace then being in full blast; Edsall purchased most of this personal property, and told witness he had made arrangements with the other purchasers, so that he had control of pretty much all the personal property; Edsall made a verbal arrangement with Pettis and witness, by which they were to have the stock, wood and coal, teams and tools, to carry forward the blast; and that half the iron made, from day to day, was to be delivered to Edsall, until the amount of iron received should equal the amount that he had bought the personal property in for, when the balance of all that personal property was to be set over to witness individually; we proceeded to use the stock and to deliver iron from day to day; afterwards, a written consent was given by witness, that the iron Edsall had received and should receive under that verbal contract, might be applied by him to the credit of the Hamburgh company; the iron spoken of, as delivered under these agreements, witness supposes amounted to seventy or eighty tons, and which is the same parcel of iron above spoken of by witness; the written agreement spoken of by witness was brought to witness by Edsall and Hamilton; and that was a consent on witness' part, that Edsall might apply the iron as above described; the paper was presented to witness at Hamburgh, and he signed it, and Hamilton signed it as a witness; witness and Edsall have not been on sociable terms formerly; he had a suit against me; we are now on good terms; witness is not sensible of any feelings that would influence his testimony against Edsall.

Joseph M. Brown, for the complainants.—In December, 1838, he was one of the firm of Brown & Lewis; that firm was creditor of the Hamburgh Co. and also of the Clinton Co. at that time; the firm was one of the party to an agreement between the creditors of the Hamburgh Co.; the creditors had a meeting, at which witness was present; Pratt was there; before the property was sold, there was an agreement that it should be set up and sold under an execution which Brown and Lewis had against the Clinton Co.; the written agreement was drawn up at Mr. Haines' office in Hamburgh; previous to the sale by the sheriff, there was no written agreement with Pratt by the creditors; but as far as witness understood, Pratt

---

Hamburgh Manufacturing Co. v. Edsall.

---

had the right to redeem the property if he complied with an agreement which was to be executed after the sale; the firm of Brown & Lewis had a judgment against the Clinton Co., and under that judgment an execution was issued, and under that execution the ore-bed was advertised to be sold; witness saw Pratt in New York; Pratt wished witness to adjourn the sale, witness replied that he was only one of the firm of Brown & Lewis, and could not adjourn it without Lewis' consent; but if he could adjourn it, he would be willing to do so, provided he could be satisfied the money would be paid; Pratt then wished witness to go to Hamburgh with him, and witness consented to do so after Pratt had referred him to Morris Robinson, and Silas M. Stillwell, and W. C. Boardman, who gave witness the strongest assurances the money would be raised by a loan; witness went to Hamburgh with Pratt in company with Nones; when witness got there, inquiries were made of him respecting the prospects of raising the money; he replied that Pratt had failed to raise the money, and wanted a still further adjournment, if it could be obtained; some of the creditors told witness it would be all folly to wait any longer, as the sale had been adjourned two or three times already; about this time the proposition of Mr. Ryerson was made; Ryerson proposed that, if the property could be so arranged as to be security to him, he would undertake to raise the money; it was then suggested, either by some of the creditors, or by Ryerson, or Mr. Haines, that the property should be sold and bought in by L'Hommedieu, for the purpose of perfecting the title in L'Hommedieu, in order that he might make a legal encumbrance on it as security to Ryerson; witness then suggested, that in case it was sold, Nones might buy it in; he thinks about this time he was asked by some of the creditors if he knew Nones, who he was, and what he was, and whether he had anything to buy it in with or not; witness replied, as near as he recollects, that he knew little or nothing about Nones, except that he had seen him at his brother's office a few times; and that when about leaving the office to go to Hamburgh, Pratt and witness stood near the door of the hall, when witness inquired of Pratt what he was waiting for, who replied that Nones was waiting for his brother to get some money; Mr. J.

---

Hamburgh Manufacturing Co. v. Edsall.

---

B. Nones came in and gave his brother some money, but what amount witness does not know, and then Pratt replied they were ready to go; it was talked over then among the creditors that it might be Nones had the money to buy it; and then Haines suggested it should be made known to Pratt in some way what Ryerson had proposed to do, and why it was advisable to have the property sold; this was to prevent Nones' buying the property and frustrating the arrangement; these matters were communicated to Pratt; witness does not know whether Pratt interfered to prevent Nones from bidding, but Pratt and Nones were talking together; the sale was then adjourned for a day or two to Newton; witness supposed the adjournment was made to give the creditors time to perfect the arrangement, because there was but little time left, and it was feared Nones would buy it in; witness did not understand that Pratt was to remain in possession of the property; L'Hommedieu was to become the purchaser, and take the title and possession of the property, and then he was to make a bond and mortgage to David Ryerson to secure the payment of a loan; and L'Hommedieu was to give Pratt a lease of the property; witness understood Pratt was to have the right of redeeming the property, on complying with that lease; witness had not, and presumes no creditor had, any object in view except to secure their debts; this understanding was had previous to the sale, and to keep Nones from bidding; it was understood that L'Hommedieu was to act as trustee for the creditors; he understood that if Pratt had effected his loan in New York, the title would have been in Pratt in fee simple, with no encumbrance but the mortgage upon it; but as it was, L'Hommedieu would hold the property, to be deeded back by L'Hommedieu to Pratt, when Pratt complied with the agreement entered into with L'Hommedieu; Edsall and L'Hommedieu have both told witness they were in possession of the property; L'Hommedieu has never rendered any account of his trust, and never offered to do so to witness; witness called upon L'Hommedieu two or three times to bring the matter to a close; L'Hommedieu offered to buy witness' claim, and offered him fifty cents; and Edsall also offered to buy at fifty cents; two years ago this summer, Edsall met witness in Broadway, and offered him twenty-



---

Hamburgh Manufacturing Co. v. Edsall.

---

five cents for his claim; at first, witness, when in Broadway, offered to take fifty cents, and Edsall offered twenty-five; at the time of the sale of the property, witness had an opinion as to the value of it; he thought if the ore-bed turned out as it was expected, it would be worth \$20,000; he formed his opinion from Mr. Fowler's opinion, who thought if it held out as it looked, it would be worth ten or fifteen thousand dollars.

Cross-examined.—The agreement, as witness understood it, was that L'Hommedieu was to buy in the property, as trustee for the creditors, and to raise money upon it, if he could, sufficient to pay off the creditors; and witness felt sanguine, from what Ryerson said, that the money would be raised, without any if's or and's about it; he understood Ryerson to say that if a legal encumbrance could be given on the property, he had no hesitation in saying a loan of that kind could be raised; and Ryerson said he had about \$6000 in his hands, and had no doubt he could raise the rest through his friends in New York; Ryerson expressed his surprise that Pratt had not been able to make the loan; he recollects that a majority of the creditors refused to give Pratt the refusal of the lease in the contract drawn up and signed by the creditors; when witness called upon L'Hommedieu, he wished L'Hommedieu to show him a statement of what he had done in relation to settling up the affairs of the Hamburgh company; L'Hommedieu said they would have to call upon the creditors for an assessment, to pay up some debts against the property; witness told L'Hommedieu he wanted him to make out his statement and bring the matter to a close, and witness was ready and willing to pay his share, in proportion to the debts witness held against the company; witness does not know that the creditors or company had any objections against L'Hommedieu and Edsall's taking possession of the property and putting it into operation.

Direct-examination resumed.—Mr. Haines, as counsel for some of the creditors, objected to its being put into this agreement that Pratt should have the refusal of the lease, because he said it would show an agreement between the creditors and Pratt, and let in the New York creditors through the Court of Chancery; by the New York creditors, was generally under-

---

Hamburgh Manufacturing Co. v. Edsall.

---

stood those who resided in New York, some of whom had judgments and some had not.

Cross-examination resumed.—He thinks there were other creditors present when Mr. Haines gave his reasons, but cannot recollect who; thinks it was to the creditors generally, the reasons were given; thinks some of the creditors there stated that they preferred giving a lease to Franklin Holcombe.

Robert Hamilton, for the defendants.—Is acquainted with Pratt, one of the complainants, and has been since about the time he became connected with the Hamburgh Co.; has done business as an attorney, both for and against the said company, and became familiar with their affairs while they were carrying on operations at Hamburgh; after Pratt became concerned in the Clinton Co., he acted as attorney for them, and became familiarly acquainted with their business and affairs; at the instance of Pratt and other persons interested in the said companies, he entered appearances for them in mostly all the suits brought against them respectively, in all to which they appeared, except in the suits brought against the said Hamburgh Co. by Joseph E. Edsall and John Givans, in which cases he was employed for the plaintiffs; soon after Pratt became interested in the said companies, many suits were brought against them, in which judgments were afterwards obtained and executions issued to a considerable amount, and by virtue of which the sheriff advertised the property of the said companies in the county of Sussex to be sold; the property of the said Clinton Co., in the county of Sussex, being a tract called the mine farm, which was adjourned for several months—until December 7th, 1838—at the instance of Pratt, to enable the said company, if possible, to meet the demands against them, or make some arrangement; the real estate of the Hamburgh Co. was advertised to be sold on the 14th of December, 1838; and certain creditors of the Hamburgh Co. (for some of whom he acted as attorney) having large demands against said company, and believing that the said real estate of the said companies would be sold by the sheriff, to prevent a sacrifice of the property, and to endeavor to secure their claims against said Hamburgh Co., entered into an agreement among themselves to buy in the property of the said company, and also the said mine tract of the

---

Hamburgh Manufacturing Co. v. Edsall.

---

Clinton Co., in order to supply the furnace on the said Hamburgh Co. property with ore, which agreement was finally concluded by the said creditors, and reduced to writing by me, at their request, and signed by the parties thereto, on the 7th of December, 1838, a copy of which is set forth in the complainant's bill; he was present when the object and terms of the said agreement were talked over and agreed upon, and signed the agreement, as attorney for one of the creditors; and, so far as his knowledge and belief extends, the said agreement was not entered into in pursuance of any arrangement or agreement with Pratt, nor had he any part or interest in the same, either in his own behalf or the said company's, nor was there any offer or engagement on the part of David Ryerson to procure a loan; Ryerson told the creditors—who doubted their ability to raise money to effect the purchase and carry on the business—that he would aid them in endeavoring to raise money for that purpose; the creditors, mostly, were averse to carrying on the furnace themselves, and therefore authorized their trustee, in the agreement, to lease the same, and to make sale of the same, also, if possible, for an amount sufficient to secure their debts; he recollects at the time, that Pratt made propositions as to how he would lease the premises, and wanted the creditors, in case they became the purchasers, to give him the refusal of the same, but the majority of the creditors expressly refused to give him the refusal of the lease, and were, at that time, opposed to his having the same, believing, as they said, that they could get the premises in the hands of a more efficient man; after the property had been bought in by the trustee of the creditors some little time, Pratt assured them that if they would give him a lease of the premises and contract for sale, for \$30,000, he had friends in New York who would assist him, and he would be able to raise the money; the creditors, not knowing what better to do with the premises, gave him the lease and contract for sale set forth in the complainants' bill; from this time on, until L'Hommedieu and Edsall entered into possession of the premises, they were mostly unused and unoccupied; in January, 1839, part of the dam gave way, and the waters carried away part of the flume, and otherwise injured the premises; the creditors felt alarmed for the safety of the property, but forebore to



---

Hamburgh Manufacturing Co. v. Edsall.

---

act in the matter until May following, when Pratt was confined in Newark jail; Daniel Haines, Esq., and myself, on behalf of the creditors, went to the said jail and saw him about the middle of May, and inquired of him what he expected to do, and whether he had any objections to the creditors taking possession; and Pratt then stated to us, that he had given up all idea of doing anything with the property, and that he relinquished all claim to the same, and said that the creditors might have taken possession before then, for he had relinquished the idea of doing anything with the property for some time previous; in June following, none of the other creditors being desirous or willing to carry on the furnace, L'Hommedieu and Edsall, by the consent of the other creditors, as I have always understood and believe, commenced putting the furnace in blast, rebuilt the dam, repaired the premises, and have been in possession ever since; since they have been in possession, I have been present at one conversation between Pratt and Edsall, in which Pratt was negotiating for the re-purchase of the property.

William W. Gillman, for the complainants.—Is acquainted with Joseph E. Edsall, and has seen and is acquainted with the iron works called the Hamburgh Manufacturing Co. Witness was there in the fall of 1839; his object in visiting them was to purchase the same; and he had an interview with Edsall at that time, in relation to purchasing the same, and had also another interview with him in the city of New York, in August, 1841, in reference to the same object; Edsall called upon the witness at that time; witness had written to L'Hommedieu previous to that time, in relation to the situation and condition of the property, and he presumes that it was in consequence of that letter that Edsall called upon him; the estimate Edsall then made of the property was \$30,000, embracing the ore-bed; Edsall valued the whole personal property at \$15,000.

Cross examined.—He thinks that Edsall over-valued the real estate, and it was his impression that he could have purchased it for \$15,000; witness thought Edsall was desirous of disposing of the property, although he does not recollect that he so stated; Edsall and L'Hommedieu stated that if witness really wished to purchase the property, they were willing to enter

---

Hamburgh Manufacturing Co. v. Edsall.

---

into negotiations with him respecting it; and he stated in a letter to L'Hommedieu, that such was his intention when Edsall called upon him, as before mentioned.

Re-examined.—Question propounded to witness: How did you get the impression that the property could be purchased for fifteen thousand dollars? Answer—Witness got the impression from Mr. Curtis that the property could be bought for \$15,000, as it was somewhat involved, provided Pratt's consent could be obtained, which witness thought might be done. Question—What did you understand by the property being involved? Answer—Witness says that he understood that the property was in the possession of other persons, and that Pratt had a claim upon it, and unless his consent was obtained, there might be some trouble about it, and he might become involved in a lawsuit.

Re-cross-examined.—Witness offered \$12,000 for the property, although he thought it was worth much more; his impression was, that it was worth from \$25,000 to \$30,000; one offer only was made by witness; he thinks that they offered it to him for \$30,000, and for no less sum; witness supposed that they had an asking price and a taking price.

Carlos J. Huntington, for the complainants.—He was formerly employed by the Hamburgh company as clerk; he thinks that it was in the years 1837 and 1838; and he resided at Hamburgh during the time he was a clerk in said company, and became acquainted with L'Hommedieu and Edsall during that time; he was in Hamburgh at the time of the sale; soon after the sale he had conversations with L'Hommedieu at Hamburgh, about the property; in the conversations referred to, L'Hommedieu stated that he was agent for the company and the creditors, and that he had bought the property in trust for the company and creditors of the said company, and that one of the objects of the sale was to secure a loan of twenty or thirty thousand dollars; what originated the conversation was, that witness had a claim of about \$100 against the company, and he called upon L'Hommedieu respecting it, who stated that he knew nothing about it, that he was trustee for the company and the creditors only.

Cross-examined.—Witness is positive that L'Hommedieu stated that he was acting as trustee for the company and the

---

Hamburgh Manufacturing Co. v. Edsall.

---

creditors of the company, as the property, he said, was to go back to the company, if the arrangement between it and the creditors thereof was carried out; witness cannot say what that arrangement was; he understood that Pratt had, or was to have a lease of it; L'Hommedieu stated that it was not their object to take advantage of the company, but merely to secure the claims of its creditors; witness understood from this conversation, that the company was to have the property back, if they complied with certain conditions; the loan referred to was twenty or thirty thousand dollars, which was to have been obtained from David Ryerson; the loan, witness supposed, was to pay the debts of the company, though he does not know that L'Hommedieu so stated it.

David Ryerson, for the defendants.—I recollect being at Hamburgh, at one time, when the property was advertised for sale, and several of the creditors of the Hamburgh Co. were present; it was the day before the mine property was sold at Newton; I went to Hamburgh to attend the sale; the sale did not take place that day, but was adjourned over until the next day, at Newton; my object in attending the sale was to aid, if I could, in any way, the creditors, to get them secured; several of the creditors about Hamburgh were particular friends of mine; I supposed their claims were in danger; I understood that some arrangements were made amongst the creditors for the purpose of protecting themselves from loss; and I understood that L'Hommedieu was to purchase the property in trust, for the benefit of the creditors; and I understood, or was under the impression that Pratt was also consulted on the occasion, and understood the arrangements that were made; he was there, and I saw him conversing with Edsall, and, I supposed, about the arrangements; I understood the adjournment was made for the purpose of enabling the creditors to perfect their arrangements; I know that the creditors talked of making a loan for the purpose of paying off the debts of the company, and I told them that I would try and assist them in making the loan; and I think I went so far as to tell some of them that I thought a loan might be obtained; I am not certain, now, as to the amount that was required to be raised by that loan—I think somewhere about \$30,000; the loan was wanted for the pur-



---

Hamburgh Manufacturing Co. v. Edsall.

---

pose of paying debts or demands against the property ; when I made the proposition, or suggested the probability of their obtaining a loan, I told the creditors there that I supposed it would be absolutely necessary for them to pledge their own personal responsibility for the amount that would be required, and that they would have to make satisfactory security to the person who should loan the money ; I think I never stated in the presence of Edsall or Pratt, or of any of the creditors, that I would procure the loan for them, or that the money should be advanced as soon as the property was sold ; I don't know that I would have advanced that amount upon the property if I had had it ; but I had not any such amount to advance, if I had had a desire to do it ; I never made that as a condition, if the property should be sold ; I think I never did agree to advance the money to the purchaser of the property, to be secured by a mortgage upon the same, upon the condition that the creditors would execute an agreement to be responsible to the mortgagee for any loss that might be sustained on account of the loan, in proportion to their several claims ; I am not acquainted with Aaron B. Nones, but I think there was a person of that name at Hamburgh, at the time spoken of, and that I saw the same gentleman at Newton the next day, at the sale ; I have no recollection of having had any conversation with him at any time about this business ; to my recollection I never told Aaron B. Nones that I was to loan, or was to procure a loan of \$30,000 ; I think I never told him so ; I am very confident I never could have told him that I was going to loan the \$30,000 myself, for I had no such sum at my command ; I have no recollection of ever having any conversation with Nones upon the subject ; I certainly never told him that I would make such loan myself, for I had no such sum to loan ; I think I stated publicly, in the presence of the creditors and others, and it is probable that Nones was present, that such a loan might possibly be procured, and that I would endeavor to aid them in procuring such a loan ; I had no knowledge, at that time, of any money that could be got for that purpose ; I did, afterwards, at the request of the creditors, make some efforts to get this loan ; I went to New York, and spent some time there for the purpose of ascertaining whether the money could be had or not ; upon reflection, I think, when the

---

Hamburgh Manufacturing Co. v. Edsall.

---

subject of procuring the loan was mentioned, it was understood that Pratt was to receive a portion of it, for the purpose of putting the furnace in blast; I think this was the understanding between the creditors and Pratt, and that some of the principal creditors so informed me; the agreement the creditors had upon the subject was reduced to writing; I am not certain that I saw the writing, but think I did; and that the adjournment was made for the purpose of getting time to prepare the writing; I did afterwards, myself, loan to L'Hommedieu \$3000, to pay on account of the purchase of the property made by him.

Cross-examined.—In reference to this business, the matters are not strongly impressed upon my memory, for, at the time, I did not suppose I should be called to testify about it, and I find that my memory is not now as good as it formerly was; at the time spoken of, there appeared to be a perfect understanding between the creditors and Pratt, but as to particulars I cannot speak; I think, however, that it was understood that a part of the money to be procured was to go to Pratt, or some other person, for the purpose of carrying on the works, and by that means enable them to pay the debts due from the company; my impression is, that part of the money to be loaned was to be applied for the purpose of carrying on the works, and it was the insistent of Pratt that he was to have the management of it; and after some conversation apart, between Edsall and Pratt, I think Pratt insisted or desired that there should be some memorandum of the agreement between them made, and that it should not rest in mere parol; to which I think Edsall replied that he would have to abide by it as it then was, or something to that effect; I do not recollect that any reason was given by Edsall at the time; at the time of the sale I understood that L'Hommedieu purchased the property for the benefit of the creditors, and was to hold it in trust for them until the debts and claims against the company were liquidated and settled; I know nothing of any reversionary interest in Pratt, or any one else; I understood that there was a written agreement between L'Hommedieu and the creditors upon this subject, but whether Pratt is a party to it or not I do not know; I do not know or recollect of any reason being given at that time why Pratt was not made a party to that agreement; if any was stated, I do

---

Hamburgh Manufacturing Co. v. Edsall.

---

not recollect it ; I believe that the conversation spoken of by me above, as having taken place between Edsall and Pratt, was before anything was said in reference to getting up the loan or carrying on the works.

In chief.—I believe that a principal part of the creditors were without any liens upon the property, and would have been in danger of losing their debts, upon a sale of the property being made ; the creditors thought it a matter of importance to secure the mine property as an appendage to the furnace, and to be connected therewith ; it was my impression that it would add much to the value of the furnace property, for the creditors to secure the mine property.

John Black, for the complainants.—I have worked for Edsall and L'Hommedieu since they had the Hamburgh furnace, about nine months and a half ; I had charge of the blast furnace ; I had a conversation with L'Hommedieu before I began to work there for him and Edsall ; I carried my claim in to L'Hommedieu, against the Hamburgh company, to know when he could give me some money upon it ; I cannot say in how long a time he said it would be before he could give me some money upon it ; it was but a short time that he took ; he said he expected to receive some money from Mr. Ryerson ; I called three or four times, but did not get any money from him ; at one time my family was a good ways from here, and I called on him for some, as I calculated to go home, and he said he had not raised the money on the Hamburgh property that he expected ; I asked him if Ryerson did not agree, or was not to advance money to pay on the debt, or the debts ; I did not understand whether all or a part of the debts were to be paid ; he said that was the understanding, that Ryerson was to raise some money, or advance some money, but had not done it ; I then asked him if he had not the Hamburgh property in hand for the purpose of raising money on it ; he said he held it as trustee for Pratt and the creditors ; he spoke of its being hard times, and wished to know from me if I could tell him where he could find a man that would loan money on the property ; I was at Hamburgh once when Ryerson was there, and heard him say he would advance money to assist in paying the debts ; there was a meeting of the creditors of the company, but cannot say



---

Hamburgh Manufacturing Co. v. Edsall.

---

whether it was the day the property was advertised to be sold or not ; Ryerson said he would advance the money, but I think he said nothing to bind him ; I think I have had conversations with some of the creditors, and was told by the person, whoever it was, that they had no more right there than he or I had, or any other person ; I mean by they, L'Hommedieu and Edsall ; I do not know that it was said by the person in what manner or way they held it.

Cross-examined.—Does not know how far he was, or how far he was not, a party to the agreement with the creditors to purchase the property ; does not think he signed the agreement ; his claim at that time against the company was about \$1000 ; nothing has been paid to him upon it ; he cannot say that he is certain his claim will be in a better situation if Pratt succeeds in this suit, than it is at present ; he has not seen Pratt very frequently since this suit has been commenced, but when he has seen him they have spoken about the Hamburgh affairs, and Pratt has spoken about his rights or claims to the property, and witness thinks he has told him what he knew about it, and what he could testify to ; Pratt has not told witness that if he succeeds in this suit witness would get his claim, or a part of it, secured, or anything like it, that he knows of, and witness has no assurance or expectation, from anything that has been said, that he should get his claim secured, any more than he ever had ; witness does not remember that he has ever told any person, since this suit was commenced, that he expected to get his pay, or anything to that effect ; he has said, and always has said, that he had hopes some day that he would get his pay, but he did not know, and does not know now, that he shall ever get the first cent ; the conversation witness had with L'Hommedieu, when he called for his pay, was, he thinks, in May, after the sale of the property ; he did not explain to witness how he held the property for Pratt ; he only said he held it as trustee ; before this, he told witness that Pratt was going to put the furnace in operation ; there was some dispute between Edsall and witness three or four months before witness left ; witness felt himself abused, and he supposes Edsall felt himself abused. Question—Was not Edsall the cause, and did he not occasion you to quit the employment at the time you did ?

---

Hamburgh Manufacturing Co. v. Edsall.

---

Answer—He was not wholly, but in part, and myself also, in making the arrangement, so that we were both satisfied. Question—Was there not a dispute and ill-feeling between you after you quit; in your settlement, or other matters? Answer—I do not think there was any dispute in regard to the settlement, but there was about some other matters after I came back from the west. Question—Have you not been on bad terms ever since? Answer—I have no bad or willful feelings against Col. Edsall; I wish him no wrong, in any shape, that I know of. Question—Have you since then been on good and friendly terms? Answer—We have not met often since, and sometimes we spoke, and sometimes we did not, but spoke as often as we did before we had any difficulty.

Robert A. Linn, for the defendants.—Was acquainted with the Hamburgh Co., and transacted business with them when they were engaged in carrying on the works here. [This witness is objected to by the complainants, as being a party to this suit.] At a meeting had by their creditors, at one time, witness thinks it was estimated that the company owed to the amount of \$30,000; this was some time before the sale of their property—some three or four months, perhaps; there were several adjournments after the meeting, and before the sales, witness thinks; when the creditors met, they concluded if they could not get the benefit of the mine property, that the property of the company would not be sufficient to secure the debts, and, therefore, they appointed L'Hommedieu as their agent, to buy the mine property; there was an agreement, as witness understood, finally concluded amongst the creditors of the Hamburgh Co., that L'Hommedieu should purchase the mine property for their use, and also the Hamburgh property; witness was one of the creditors, and one of the parties to that agreement; the object of purchasing in that property was to have the control of it, so as to save their debts; the sales of the property were adjourned several times, and, as witness understood, at the request of Pratt, who it was said had proposed or suggested that he could procure means that would save the necessity of the sale; witness does not know that he heard Pratt say this, but, at one of the adjournments, he heard Pratt say that he had \$17,000 in escrow, which would be forthcom-

---

Hamburgh Manufacturing Co. v. Edsall.

---

ing in a little time; witness did not exactly understand what it meant, as he had never heard the term used before; he was present at the sale made at Newton; the property was purchased by L'Hommedieu, for the benefit of the creditors; he did not understand that it was for the benefit of Pratt; witness understood at the time, from some persons there, that if the property was purchased in for the use of the creditors, and the title could be made secure, David Ryerson had said he would aid and assist, or do what he could to assist them in procuring a loan for the purpose; witness thinks he did not hear Ryerson say anything himself on the subject; the loan, as he understood, was to be for the amount of the debts, which was about \$30,000; witness does not know that he heard Ryerson say that the personal responsibility of the creditors would be required to obtain the loan, but that was said by somebody; witness made up his mind that he would not give his joint responsibility, but would give his own responsibility for the amount he might receive; the object of procuring the loan was, as he understood it, to pay the claims of the creditors; he thinks he understood there was a lease of the property made to Pratt by L'Hommedieu, and a contract for a sale to him of the premises; witness thinks he saw the lease; he thinks he was present when it was made, and there was some difficulty about it; he understood that Pratt wanted more of the proceeds resulting from the blast or the works to enable him to carry them on, and less of them to be applied towards liquidating the debts; witness recollects at one time it was proposed by some one, that a lease should be made of the property to Joseph H. Pettis, or to Franklin Holcombe, but to this Pratt objected, stating that they were his hirelings, and he would not consent to it; witness does not know who were Pratt's agents after he took the lease; there were several persons there who said they were his agents; it must have been several months after the lease was made to Pratt, before L'Hommedieu and Edsall took possession of the works; during that time they were idle; while the works were thus idle, Edsall proposed to witness that as we were two of the largest creditors, we should put the works in operation, but witness declined having anything to do with it, as he considered it a losing business; our claims were more



---

Hamburgh Manufacturing Co. v. Edsall.

---

in amount than one-half of the whole debts due from the company.

William Simpson, Jr., for the defendants.—The Hamburgh company were indebted to him at one time; he assigned his claim against the company to L'Hommedieu; sometime before the sale, the creditors began to think they would not get their money; the creditors, before the sale, had several meetings to concert some measures by which to secure their debts; there was finally an arrangement made by them to buy in the property at the sheriff's sale; the arrangement made was to buy in the mine property with the furnace property; witness thinks the talk was that it was deemed of importance to have that bought in with the other to secure their money, and they appointed L'Hommedieu as their trustee, to buy in the property for them; witness was at Hamburgh the day before the property was sold at Newton and he was also at Newton the next day, when the property was sold; L'Hommedieu was appointed trustee to purchase the property solely for the creditors; witness never understood that Pratt was to have any interest in the purchase, or any other person except the creditors, to his knowing; the understanding was, at the time, that if the creditors purchased in the property, they would endeavor to raise money upon the property to pay the debts; witness recollects that David Ryerson was at Hamburgh the day before the sale, and said that if the creditors would purchase in the property, he would endeavor to assist them in raising the money, and he spoke of one or two places where he thought the money might be obtained; they, the creditors, failed to raise the money; Ryerson said that it would be necessary for the creditors to give their own responsibility to enable them to raise the money; after L'Hommedieu purchased the property, witness recollects something about a lease and contract being made out from him to Pratt; he, as one of the creditors, was consulted about the terms of it; there were a number of creditors together on that occasion, and consulted upon the subject; something was said about the prices of the wood and ore that he was to pay, and there was a difficulty also about some money that Pratt wanted the creditors to raise for him, to help him along with the works; there was also a difficulty about some money re-

---

Hamburgh Manufacturing Co. v. Edsall.

---

quired by Pratt to be raised by the creditors for him, to aid him in putting the works in operation ; at first the creditors refused to raise any money for him, but afterwards we agreed to advance some, but a difficulty then arose as to the way in which it should be paid in ; the creditors were willing only to pay in in small sums, as he went along with the works, and not to pay in the whole amount required by him ; it was finally settled, however, and a lease, witness thinks, was made to him by L'Hommedieu ; there was difficulty, also, he thinks, about the amount of the yearly payments that were to be made by Pratt, but he cannot state what the difficulty was, exactly ; there were a good many of the creditors then opposed to driving on the works by themselves ; witness thinks after Pratt got the lease, there were some stones drawn there by some of his hands, for the purpose of repairs, but nothing more was done, and the property lay idle through the course of that winter and spring, until L'Hommedieu and Edsall took the possession.

Cross-examination.—L'Hommedieu paid witness fifty cents on the dollar, on the amount of his claim ; he gave his note for it ; witness does not recollect whether there was anything said about a lease to Pratt on the day before the sale ; he thinks there was something said about it at Newton, on the day of the sale ; it was understood, at that time, that Pratt was to have a lease of the property ; it was so talked among the creditors ; witness does not recollect of any reason being given, at that time, why the agreement was not then executed ; he does not recollect that Pratt was desirous this should be done before the sale ; he does not know that he was, or was not ; witness does not think that he remembers all that took place among the creditors, at that time, nor the one-half of it ; he thinks that Mr. Ryerson spoke, also, at Newton, of assisting to raise the money ; he does not know but what it was talked, at Newton, about raising money for Pratt, to enable him to carry on the works ; he thinks all these arrangements were talked over at Newton, on the day of the sale ; he understood the object of raising that loan was to assist Pratt, so as to enable him to put the works in order ; he understood that the creditors were to assist in raising for Pratt the money required to put the works in operation ;

---

Hamburgh Manufacturing Co. v. Edsall.

---

each one was to pay his proportion; he thinks \$1500 was the sum that Pratt wanted; the money spoken of to be raised by the assistance of Ryerson, was to go to pay off the claims of the creditors, as he understood; that, also, was talked of at Newton; it was understood, if this loan was obtained, that whatever the property sold for, less than the amount borrowed, the creditors were to make up the deficiency; the property was to be mortgaged for the amount borrowed, and if it was not worth it, we were to make up the difference.

In chief.—Witness meant, by the loan to assist Pratt, the money that was to be advanced to him by the creditors, as mentioned in the lease; the lease and contract, as made out to and with Pratt, are in conformity with the arrangement and understanding made and had at Newton, and was made out shortly after the sale.

Cross-examination.—Witness saw the lease after it was drawn, and he thinks it was in conformity with the agreement made with the creditors; he does not know that he ever saw any other contract that was made with Pratt, nor does he know of any other contract being made with him, except this lease; nor does he know that he ever heard of any other; he saw the lease, on the day of the sale, at Newton, that was drawn there; that lease, as he understood, contained the agreement between the creditors and Pratt.

In chief.—After the sale, witness thinks it was, he met with some of the creditors, at Mr. Haines' office in Hamburgh, on the subject of making out the lease to Pratt; it appears to him that Mr. Haines read the lease over then; witness almost forgets about it; he supposed that the lease and contract spoken of was all one and the same thing; he may be mistaken about hearing the lease read over at Newton; it might have been the contract that he heard read there. [The paper marked Exhibit E 2 on the part of the defendants, being shown to the witness, and parts of it read over to him, he says]—It sounds like the same that was read over in Mr. Haines' office, at the time mentioned, when the creditors met there; he is now satisfied that the lease was made out at Mr. Haines' office, after the sale, and that it was the contract that he heard read over at Newton, and not the lease.



---

Hamburgh Manufacturing Co. v. Edsall.

---

John Vandegriff, for the complainants.—He was present at a meeting of the creditors of the Hamburgh company, at Hamburgh, a day or two before the property was sold ; he recollects seeing Mr. David Ryerson there ; there was a conversation at the time among the creditors that Ryerson would, or was about to raise a loan, to assist Pratt ; he understood it so ; the way witness understood it, and the way it was talked there, Ryerson was about to raise a sum of money for Pratt, and it was to be paid, so much of it to the creditors of Pratt, but he does not recollect the amount, and Ryerson was to advance some of it to Pratt, to enable him to go on with the works and keep the furnace in operation ; he understood that the real estate was to be set up and sold, but Pratt was to have it restored back after the sale, or something to that effect ; he cannot recollect distinctly the express terms ; he heard it talked of about the door, among the creditors ; he did not understand who was to buy the property ; he was at that time a creditor of the company to a considerable amount ; he has no interest in it now ; at that time witness was there for the purpose of looking after his rights ; he was not at Newton the day of the sale of the property.

Cross-examined.—The company was indebted to the firm of which witness was a partner, but not to him individually ; the amount of the indebtedness was considerable ; he thinks the debt due the firm is not paid, but he has assigned away his interest to William Edsall ; witness owed William Edsall, and transferred his claim to him, that is, his share of the claim, for the amount.

In chief.—Witness understood that the property was to be sold at Newton on the day to which the adjournment was made, and that Pratt was to go on with the works.

Samuel Truex, for the complainants.—Was at Hamburgh at the time the property was advertised for sale ; David Ryerson was there ; there was a meeting of the creditors of the Hamburgh company there that day ; the understanding of witness was, at the time, that Ryerson was to raise, he thinks it was \$30,000, for the purpose of paying the debts of the company ; L'Hommedieu was to purchase as trustee, between the creditors and the company ; that was the general report among

---

Hamburgh Manufacturing Co. v. Edsall.

---

the creditors ; Robert Lewis, witness thinks, was the one who told him what the arrangement was at the time ; his understanding at the time was, if Ryerson raised the money, and the property was sold, the company was to carry the works on.

Cross-examined.—Witness had been, shortly before, employed by the company as clerk for them, and as an agent for them, so far that he sold goods for them and had a superintendence over their works ; Mr. Howard was the principal agent ; witness thinks he commenced there about the 12th of January, 1838, and continued until about the 12th of August then next ; he made contracts of purchases for them, and managed their business here ; the creditors of the company about then manifested a good deal of anxiety about the safety of their claims ; a good many of them considered their money very doubtful, and he heard a number of them so express themselves ; after Pratt had the lease, witness thinks he heard it from some quarter, but does not recollect that he heard it from Pratt, that he, Pratt, was to get some man in New York to purchase the property, and witness understood that Pratt and L'Hommedieu had gone to New York for that purpose ; witness thinks the balance that was coming to him from the company was about forty-four dollars ; one day he saw L'Hommedieu at the store, who offered fifty cents on the dollar for the claim ; witness told him he would take it ; he then said he had not the money by him, but would pay in a short time ; witness never made a transfer of the claim to L'Hommedieu ; he thinks he has heard it talked of among the small creditors of the company, that they were afraid of losing their claims entirely, by reason of the many larger claims, which, he understood, many of them, were liens by mortgages, and therefore they were anxious to have the property purchased in, for the common benefit of all ; his understanding was, that the smaller creditors were fearful of losing their claims, if a sale of the property was made without some such arrangement.

Joseph Sharp, for the complainants.—Was at Hamburgh at the time there was a meeting of the creditors of the Hamburgh company, when the property was under advertisement for sale, and was also present when some part of it was sold ; David Ryerson was there the first day, but not the second, as witness

---

Hamburgh Manufacturing Co. v. Edsall.

---

recollects; witness had a mortgage at that time on a part of the property; there was a good deal of talk among the creditors at the time; witness went into the room, and Ryerson, Edsall, L'Hommedieu and Pratt were all in there together; a little while after Pratt came out, and there was a general talk out in the other room amongst the creditors, and, as witness was concerned, he was talking with them; and it was talked of making an arrangement with Ryerson for a loan, as he understood, of about \$30,000; \$4000 of the sum was to go to Pratt to carry on the business; and the same time, as he understood it, the money was to go to pay off the general creditors; it appears there was an adjournment, and something was to be done at Newton at the day to which the adjournment was made; at the time of the sale witness attended again; whilst the sale was going on, he was told by the creditors that it was agreed that L'Hommedieu should buy the property for the benefit of the creditors and the company; he was to buy the property, as witness understood, as trustee; witness had an intention to buy the lot that was subject to his mortgage; he did not buy, because he understood it was to be bought in for the benefit of Pratt and the rest of the creditors, and because Pratt was to have \$4000, as witness understood, to go on with, and he was willing he should have it; his chief conversation with the creditors was with Robert Lewis, Joseph M. Brown and William Edsall, on the subject.

Cross-examined.—Question—Did you ever hear Pratt say, shortly after the sale of the property, that he had obtained a lease, or contract for a re-sale of the property, from Dr. L'Hommedieu, after he had purchased it? Answer—Yes, I did hear him say that he had such an article, and that Mr. Thompson had written it; I understood it was from Dr. L'Hommedieu.

He understood that the money that was to be raised by the loan, was to go to pay the creditors who were willing to come in and sign a certain article amongst them, to contribute their share of the sum that was to be advanced, to enable the works to go on; this he understood from Joseph E. Edsall; the claims of all the creditors generally, were to be bought up as cheap as they could be; L'Hommedieu and Edsall, he understood, were to buy them up; he does not know whose funds



---

Humburgh Manufacturing Co. v. Edsall.

---

were to be used for the purpose of buying up these claims; he understood that the benefit the company was to derive from the sale of the property to L'Hommedieu, was the buying up of the outstanding debts at a discount; he did not understand that L'Hommedieu and Edsall were to drive on the property; understood that Pratt was to do it; the reason why witness intended to buy the wood lot that was subject to his mortgage, was, that he thought if he could get it for a trifle, it would save him the necessity and expense of foreclosing his mortgage; L'Hommedieu and Edsall have trespassed upon witness, and he has prosecuted them; but that would have no effect upon the evidence he gives on this occasion.

John H. Simpson, for the complainants.—Was present when the sale was adjourned, at Hamburg; was then a creditor of the company; they owed him three hundred and sixteen dollars for work and labor for the company; was present at two or three meetings of the creditors of the Hamburg company, in reference to the settlement of the debts, and the sale of the property of the company; L'Hommedieu and Edsall were both present at some of these meetings, and sometimes one of them, consulting; witness heard Edsall say he was a creditor to a large amount, but does not recollect of hearing L'Hommedieu say he was; has heard both of them say that L'Hommedieu had bought the property as a trustee for the company, and the creditors and concern, so as to make title; L'Hommedieu was a general agent for the company and creditors, as witness considered; he understood from them that Pratt was to have a redemption in some way, in case he should fulfill certain contracts; these contracts were to raise some certain payments for certain persons, preferred creditors; heard a general talk at a meeting of the general creditors, at which L'Hommedieu and Edsall were present, about their making a loan of David Ryerson, of \$30,000.

Thomas D. Edsall, for the defendants.—Was a creditor of the company at the time of the sale of the mine property, as one of the firm of Vandegriff & Edsall; we made an assignment of this claim, and witness has no interest in it now; was at Newton at the time of the sale of the Hamburg property, and signed the agreement among the creditors at Newton; had

---

Hamburgh Manufacturing Co. v. Edsall.

---

no knowledge, at the time of the purchase of the property, of any other object or purpose for the purchase, than is mentioned in that agreement; it was his understanding that the written agreement embraced all the objects and purposes that the creditors had in view at the time; witness was present at several meetings of the creditors after the sale, to consult and determine what disposition to make of the property, as Pratt did not comply with the lease; these meetings were after Pratt had failed to comply with the article and lease given to him by the trustee; Pratt did not do anything about the premises towards putting them in operation, after he got the lease; the dam, or a part of it, had, in the meantime, gone away, and the property was unoccupied; it was while the property was in this situation that the creditors had the meetings spoken of; witness heard several of them intimate that they would rather lose their debt than have anything to do with driving the furnace; there was a meeting of the creditors just before L'Hommedieu and Edsall took possession; witness thinks he heard it reported by Mr. Haines, or some one else, at that meeting, that he had seen Pratt, and that he had given up all hope of doing anything; he understood that Mr. Haines had been requested by the creditors to see Pratt; at the last meeting of the creditors, before L'Hommedieu and Edsall took possession of the property, the creditors were desirous that they should do so, and appeared to be very anxious that they should go on; when they commenced to drive the works they furnished and provided everything with their own means, and have done so ever since; witness heard Mr. Abram Walker, who was the agent of Pratt, say the day before he left the furnace, and after Pratt had got the lease, and in the month of February or March, that he was going to abandon the concern, as there was not any prospect of Pratt's doing anything; Walker went from here to New York; witness thinks he recollects of Pratt's representing about the time he got a lease for the property, that he had a man in New York who would buy the property; the creditors were kept in suspense for some time by these representations of Pratt that he was making efforts to sell the property and raise money; he fixed time after time when it would be accomplished, every week or every two weeks, that somebody would be up, according to

---

Hamburgh Manufacturing Co. v. Edsall.

---

his talk ; witness recollects of L'Hommedieu's starting to go to New York with Pratt, to see what could be done ; this was after considerable delay.

Robert Lewis, for the defendants.—Resided at Hamburgh while the Hamburgh company were carrying on business ; was a creditor of the company, as one of the firm of Brown & Lewis ; they owed us, at the close of their company's concerns, between twelve and thirteen hundred dollars ; at the time witness made an assignment of his part of the claim to L'Hommedieu, the whole debt was upwards of thirteen hundred dollars ; he recollects a meeting of the creditors in Hamburgh, about the time the mine property was advertised to be sold ; the sale of this property was adjourned from time to time ; the claims against the company were, witness believes, generally considered very doubtful at that time ; he thinks the debts of the company were estimated at that time to be over \$30,000 ; this estimate did not include the city debts, but was made up of the debts in the country ; it was made with the assistance of Pratt, or some of the agents of the company ; one of the executions, by virtue of which the mine property was sold, was, witness believes, in favor of Brown and Lewis ; the creditors were desirous of purchasing in the mine farm in connection with the furnace, so as to make them more valuable, and secure their debts ; for the purpose of buying in that property, L'Hommedieu was appointed the trustee of the creditors, as he understood it ; after the sale of the property, when the lease was about to be made out to Pratt, witness was consulted as one of the creditors about the terms of the lease ; there was also a contract of purchase given to Pratt, as he believes ; he does not think that Pratt did anything at the furnace after he got the lease ; the dam went away shortly after ; witness recollects of his professing that he was about to raise money on the property, after he got the lease ; and understood from him that he had a man in New York from whom he could raise the money ; Pratt kept the creditors in suspense during the winter and spring, under the expectation that he would raise money on this property for the creditors ; witness recollects of L'Hommedieu starting to go to New York with Pratt to aid him in effecting this arrangement ; on his return, L'Hommedieu reported to the creditors



---

Hamburgh Manufacturing Co. v. Edsall.

---

that Pratt was arrested and confined in jail ; the creditors met several times afterwards, to consult what to do with the property ; the majority of them were averse to embarking in the business ; witness was strongly opposed to it ; he stated at the time that he should prefer losing his debt rather than for the creditors to embark in the business and spend any more money on the property, and he should be of the same opinion now ; there was a proposition made at the time for the creditors to join and carry on the works ; witness never heard any objections to any one who pleased taking the works and going on with them ; he himself had none ; at this time he should not value this property, including the mine occupied by Edsall and L'Hommedieu, at more than \$20,000 ; he should think it would not sell for as much as that at this time ; he has never considered this property, since the failure of the company, or at the time of the sale, worth \$30,000 ; witness presumes that any understanding which the creditors had made with Pratt was carried out with him in the contract and lease made with him, and that they gave him every indulgence, as long as there was any hope of his doing anything.

Benjamin Hamilton, for the defendants.—After Pratt got the lease and contract for the premises, witness knows of his making representations here, from time to time, that he was about making arrangements to raise the whole money, and satisfy all the creditors ; after Pratt got the lease, they drew some timber on the ground, witness thinks for the dam, and made some preparations for the dam ; he knows of nothing else in particular being done ; Abram Walker had the works in charge at that time, as he understood, as agent for Pratt ; he knew of Walker abandoning the premises in the spring, and heard him say that Pratt did not furnish means, that he had disappointed him a number of times, he would give the whole thing up, and L'Hommedieu and Edsall might go on and do what they pleased with it ; witness doubts whether this property was, at the time of the sale, or now, good security for \$30,000.

Alpheus R. Turner, for the complainants.—Has frequently conversed with Edsall respecting the affairs of the Hamburgh company ; on two or three occasions subsequent to the sale, had

---

Hamburgh Manufacturing Co. v. Edsall.

---

conversations with him about the sale of the property of the company, and the conditions of it; from the conversations with Edsall, witness gathered that the sale of the works took place, and L'Hommedieu bought them, for the purpose of perfecting a title, and obtaining a loan on the property; the loan was to be made, according to Edsall's statement, for the purpose of paying off certain debts of the company, and the residue was to go to Pratt, to enable him to carry on the business of the company, and Pratt had a time to redeem it in; the property was to go, as witness supposed, to Pratt or the company; they were to have the reversion after the creditors were paid off; never had any conversation with L'Hommedieu; was present at the time the creditors of the company were assembled, and the sale was going on; heard previous to the sale, and at the time thereof, and it was then stated, that the property was to be sold as before stated, and that David Ryerson would obtain, or endeavor to obtain, a loan of \$30,000, and that, in consequence of that arrangement, persons interested in the property consented to the sale; understood there was a mutual arrangement between the parties interested, knows that this arrangement prevented any competition at the sale; saw Pratt there; there was, apparently, a good deal of interest felt in the sale of the property; there were a great many persons there; there was a general understanding at the time of the sale, that there was a negotiation going on between Pratt and the creditors of the company, respecting the sale of the said property.

Cross-examined.—Previous, and at the sale of the property, it was witness' impression, and he believes that it was the impression of the creditors generally, and he was a creditor, that the property of the company was not sufficient to pay them; the reason that witness came to that conclusion, was not on account of the intrinsic value of the property, but on account of the bad management of the property, and the want of means properly to carry on the business.

Re-examined.—At the time witness expressed his opinion as regards the company not being able to pay their debts, the said ore-beds did not belong to the company; when witness spoke, on his cross-examination, about the company not being able to pay their debts, he did not mean to include the ore-bed; the ore-bed

---

Hamburgh Manufacturing Co. v. Edsall.

---

witness thought, if properly managed, was worth more than the whole of the company property.

Joseph M. Brown, for the complainants.—[Exhibit A F being shown him, he says]—That the said paper, signed Joseph M. Brown, is in his own handwriting.

Cross-examined.—Not long before the sale he met with the creditors of the company, at Daniel Haines, esquire's, office, and then, from the best evidence that was adduced, the debts of the company were supposed to amount to between thirty and thirty-three thousand dollars; witness thinks it was upwards of thirty-two thousand dollars, according to the claims then presented; this was the sum claimed to be due to the creditors for whom L'Hommedieu was to purchase; some of the claims above referred to were disputed by Pratt, and it was to be left to arbitrators to determine the same.

Re-examined.—At the request of Mr. Haines, and other of the creditors, at the time the sale was to take place, he went to Pratt, to get him to consent to a sale of the property, without any agreement in writing as regarded the terms; witness went accordingly, and Pratt declined doing anything then, as he wished to consult Mr. Thompson before he did anything on the subject, expressing his fears that the creditors of the company might overreach him; the sale of the property of the company was then adjourned, to enable Pratt and the creditors to carry out the arrangement.

Re-cross-examination.—Witness considered himself in the confidence of Pratt, and of the creditors, at the time of the sale of the property of the said company; witness says that he was acting as the friend of Pratt, and of the creditors of the company, at the time.

Joseph H. Pettis, for the complainants.—Was present at the sale of the mine property, at Newton, which sale of said property was first advertised to take place at Hamburgh, and afterwards adjourned to Newton; the reason why the sale of the said property was adjourned from Hamburgh to Newton, was that at Hamburgh, on the day the sale was to take place, the creditors and persons interested in the sale agreed to adjourn it till the next day; there was a good deal of negotiation between the creditors and the company; there was a meeting on



---

Hamburgh Manufacturing Co. v. Edsall.

---

that day between the creditors and Pratt, at the tavern in Hamburgh; Mr. David Ryerson was there; witness understood from the parties interested, that provided the sale of the said property was adjourned over to take place at Newton, he, Ryerson, thought he should be able to procure a loan of some \$30,000, upon certain conditions, which were, that the said money should be paid to the creditors of the company, with the exception of from two to four thousand dollars, which was to be paid to Pratt, for the purpose of enabling him to carry on the works of the said company; in pursuance of this arrangement the sale was adjourned to Newton, and Mr. Ryerson informed the parties that he could not effect the loan; and then further negotiations on the subject took place; the sale was adjourned there once or twice; it was his understanding that it was agreed that L'Hommedieu should purchase the property, but in what capacity, whether as trustee or not, he cannot say, only it is his impression that Pratt was to have a lease of the property back; witness was anxious, as one of the parties interested, to have Holcombe's name inserted in the lease with Pratt's; at the time the sale was to take place, witness asked L'Hommedieu whether the lease was to be made to Holcombe, or to Pratt and Holcombe, and witness being informed that it was to be given to Pratt alone, he informed L'Hommedieu that he should then bid on the property, and witness accordingly made two or three bids on it; he was then taken out by some of the parties interested, who stated to him that he was injuring himself and his interests, and from their representations he ceased bidding; he cannot recollect who it was that spoke to him; witness understood that L'Hommedieu was to buy the property, as well for the benefit of the company as for the creditors, and that Pratt was to have a lease of the same; at the time these negotiations were going on, a question arose whether an agreement to execute a lease to any person, before a sale took place, would be valid, and there was some disagreement on the subject; the lease, however, witness thinks, was executed after the sale; it was a part of the arrangement at Hamburgh, that L'Hommedieu should buy the property, in order that Ryerson should obtain a loan on it, as above alluded to; witness' impression is that, during the negotiations at Hamburgh and

---

Hamburgh Manufacturing Co. v. Edsall.

---

Newton, it was understood that L'Hommedieu was to buy the property for the benefit of the company and the creditors of the company, and that he was to act in a capacity for the benefit of both; and witness is confirmed in that belief, from the circumstance that, on former occasions, L'Hommedieu had acted in that capacity; witness understood, at the time, that after the debts of the company were paid, the property was to revert to the company; his impression is, that such was the general understanding among all the parties interested, both the creditors and the company; the sale was made, witness thinks, at Newton, in consequence of a similar arrangement to that entered into at Hamburgh; but Ryerson not being able to make the loan, the property was sold, at Newton, to L'Hommedieu, both for the benefit of the creditors and the company; the desire appeared among all, to be, that the creditors should be paid, and that the company should go on.

*B. Williamson and H. W. Green*, for the complainants. They cited *Saxton* 184; 3 *Green* 266; 2 *Ves.* 225; 4 *John. Ch. Rep.* 167; 4 *Kent's Com.* 141-2.

*S. G. Potts and P. D. Vroom*, for the defendants. They cited *Saxton* 274; 1 *John. Ch. Rep.* 429; *Sugden* 204-5.

**THE CHANCELLOR.** The answer of Edsall and L'Hommedieu admits that they are in possession, and the character of their possession. That Edsall took possession as mortgagee, and that L'Hommedieu, afterwards, as purchaser at the sheriff's sale, and as trustee for the creditors, took possession of the premises not included in Edsall's mortgage, and also of the Clinton mine farm, and that they afterwards agreed to unite in putting the property in repair and the furnace in blast, and in carrying on the business. L'Hommedieu admits he bought the Clinton mine farm and the property of the Hamburgh company, at the sheriff's sale, under the powers and instructions, and for the sole purposes stated in the agreement of December 7th, 1838, and as trustee for the creditors therein named. Edsall, then, is accountable for the rents and profits of what he is in possession of, and, unless something has taken place to divest

---

Hamburgh Manufacturing Co. v. Edsall.

---

the right of the Hamburgh company and vest it in another, he is accountable to them. And L'Hommedieu holds subject to account, as trustee, and to be called upon to convey to the beneficial owners.

But these defendants deny that they, or either of them, are subject to account to the complainants, or either of them, or that the complainants, or either of them, have any right to redeem, and say that the persons entitled to redeem, as against Edsall, and to call L'Hommedieu to account as trustee, are certain creditors of the Hamburgh company, including L'Hommedieu and Edsall, who entered into the agreement of December 7th, 1838, for the purchase of the property by L'Hommedieu, as their trustee, at the sheriff's sale. This is so, if that sale can be sustained in equity.

On and before December 7th, 1838, the sheriff of Sussex had in his hands against the Clinton Manufacturing Company a *fi. fa.* issued out of the Common Pleas of Sussex, in favor of Robert Lewis and Joseph M. Brown, for \$1008.27, and an execution from chancery, in favor of Nathan Smith, on a decree on a foreclosure bill, dated March 25th, 1836, for the sale of so much of the mortgaged premises as would be sufficient to pay the amount of the decree and costs. Under these two executions, the sheriff had advertised the Clinton mine farm, containing one hundred and nine acres and fifty-seven hundredths, and the sale stood adjourned to the said 7th of December, 1838. There was due on the two executions, including interest, costs, and sheriff's fees, but about \$3500, and the encumbrance on which the decree in chancery was founded, was the first encumbrance, so that the purchaser at that sale would get a clear title. Both L'Hommedieu and Edsall had valued this mine farm, about a month before, at \$50,000, as appears by certificates under their hands, given in evidence. On this mine farm, Edsall held a subsequent mortgage, dated January 10th, 1838, for \$4000. This farm was sold, at said sheriff's sale, for \$4041.

The same sheriff had in his hands, at the same time, five executions, or judgments at law, against the property of the Hamburgh company, on which he had also advertised their property for sale, viz. :



## Hamburgh Manufacturing Co. v. Edsall.

J. E. Edsall's execution, tested Nov. 29, 1837, for \$1,934	85
John Givans' execution, tested Dec. 1, 1837, for...	131 15
Wm. Jackson's execution, tested 3d Tuesday in	
August, 1838, for .....	816 48
Stephen Wray's execution, tested 1st Tuesday in	
September, 1838, for ....	1,071 75
Davenport's execution, tested the same day for.....	2,861 55

Amounting, in all, to ..... \$6,815 78

The answer of Edsall and L'Hommedieu says that these defendants, L'Hommedieu and Edsall, and other creditors of the Hamburgh company, deeming it important to the security of their claims against the Hamburgh company that the Clinton mine, from which the Hamburgh company got their ore, should be bought for the benefit of the Hamburgh furnace; and despairing of Pratt's being able to pay or secure their debts, met, several weeks before the day appointed for the sale of the Clinton mine farm, to consult as to the best means of securing their debts; and that it was then agreed among said creditors of the Hamburgh company, that if the Clinton mine tract and the Hamburgh property should be sold on executions, they would appoint one of their number to buy the same, for the benefit of such of the creditors as should become parties to the agreement, in case no one should, at the sale, offer enough to pay the encumbrances and secure the said creditors; and that, at that meeting, the said creditors settled on most of the principles of the articles of agreement afterwards executed on the 7th of December, 1838.

The arrangement of these certain Hamburgh creditors, then, was this: that, lest the Hamburgh property should not bring enough to pay their debts, they would appoint one of their number to buy the Clinton mine and the Hamburgh property. But how would the purchase of the Clinton company's mine help pay the debts of the Hamburgh creditors, if it was bought at its fair value?

This part of the answer further says that the debts and encumbrances against the Hamburgh property, to the best of the knowledge and belief, &c., exceeded \$30,000, and that the debts of the Clinton company existing as liens on the Clinton mine tract, exceeded \$10,000. What had the liens on the Clinton

---

Hamburgh Manufacturing Co. v. Edsall.

---

mine tract to do with the Hamburgh creditors? And how is the amount of liens on the Clinton mine tract to account for the bid at which it was struck off, it being sold on a decree on the first encumbrance?

Again, as to the Hamburgh lands, the answer says the debts and encumbrances against the Hamburgh company exceeded \$30,000. What were the encumbrances to which they would be subject in the hands of the purchaser at the sheriff's sale? The answer does not tell us.

The plain meaning of the arrangement made by those of the Hamburgh creditors who entered into the agreement of December 7th, 1838, was, that the Clinton mine farm was to be bought as a means of securing their debts against the Hamburgh company, which necessarily carries the idea that it was to be bought for less than it was worth, and prepares us against surprise from the testimony showing the means taken to prevent competition at the sale.

The agreement of December 7th, 1838, is signed by L'Homedieu for himself and as trustee, and by Edsall for himself and William Riggs, and by eighteen other creditors of the Hamburgh company, by themselves, their attorneys or assignees. Edsall held, at the time, a subsequent mortgage on the Clinton mine farm, which would be cut off by the sale. Would he have suffered this mine farm, of the value of which his own estimate was \$50,000, to be struck off to another, or to a trustee for these Hamburgh creditors, for \$4041, without some arrangement by which his subsequent mortgage was to be provided for? Certainly not. And accordingly, the agreement itself authorizes the trustee, who was to buy at the sheriff's sale free from this mortgage, to purchase and procure it from Edsall; and authorizes the trustee to raise, by bond and mortgage on the properties to be purchased, after they should be purchased by him for the said creditors, sufficient moneys to pay the purchase money thereof, and also sufficient to purchase and pay for the two Winslow mortgages and the Sharp mortgage on the Hamburgh property. And it appears, by an endorsement on the back of the Edsall mortgage, dated December 10th, 1838, two or three days after the sale of the Clinton property to L'Homedieu, the said trustee, that Edsall assigned his said mort-

---

Hamburgh Manufacturing Co. v. Edsall.

---

gage, and the bond it was given to secure, to L'Hommedieu, for \$4220, acknowledged to have been received by him from L'Hommedieu. By this arrangement Edsall was silenced as a bidder, and it carries on its face an admission of these agreeing creditors, that they could pay at least \$8200 for the Clinton mine tract, and that its value, beyond that, would be a means of securing their debts against the Hamburgh company. But what is the effect, beyond this, of this transaction, on the Clinton company and its creditors? It is this: the Clinton company and its creditors have had their property, valued by two of the very purchasers at \$50,000, taken from them, by this arrangement, for \$4041, and this bond to Edsall still remains a debt against them.

But this was not all that was done to prevent competition at these sales. What had been done with and for Edsall could not be relied on as sufficient to secure to these agreeing Hamburgh creditors the purchase of the properties of the two companies at prices suited to their purposes. Something was necessary to be done to induce Pratt to use means to prevent competition; and the evidence showing what was done for this purpose is so consistent with the occasion and the purposes of these creditors, that there can be no good reason for doubting it. (The evidence on this part of the case is here examined.)

It is certain that, after the sale, a lease was made to Pratt for three years, and a contract entered into by L'Hommedieu with Pratt, to convey to him the whole Hamburgh property and the Clinton mine tract, for \$30,000, by deed of release, with the usual covenants against his own acts. The mortgages which then existed on parts of the Hamburgh property, amounting to \$7701.75, were to be considered as part of the said \$30,000. And this contract was made by L'Hommedieu, who was trustee of all the said property for the Hamburgh creditors who entered into the agreement of December 7th, 1838. This is, of itself, evidence that the lease to and contract with Pratt were made in conformity with an understanding had and made before the sales. But the evidence is clear that there was such an understanding. True, the agreement of December 7th, 1838, did not state in terms that the lease and contract to convey should be made to Pratt. It authorizes and directs the



---

Hamburgh Manufacturing Co. v. Edsall.

---

trustee to lease all the Hamburgh property and the Clinton mine "to some suitable competent person." The reason why Pratt's name was not inserted is obvious, and is shown by the testimony. The legal adviser saw that it would be putting on the face of the agreement evidence of the arrangement with Pratt, to enable these agreeing Hamburgh creditors to succeed in adding the Clinton mine farm to the Hamburgh property, at their own price. It is evident, from what passed before the sale, that Pratt relied on getting this lease and contract; and he did get them. And it cannot be disguised, under the circumstances and testimony in the cause, that he got them in pursuance of an understanding between him and the agreeing Hamburgh creditors had before the sale. The result, the fact that the Clinton mine farm was struck off to L'Hommedieu for \$4041, free from all encumbrances, and all the Hamburgh property for \$285, subject only to the mortgages, shows it. But there is an amount of evidence on this point that cannot be resisted.

The agreement among the creditors themselves is one thing; the agreement or understanding had before the sale, between those creditors and Pratt, is another. The lease and the privilege of purchasing were to go together; this is shown by the agreement itself, in which the Hamburgh creditors who signed it, united. And that Pratt was to be the lessee, and have the said privilege, and that it was so understood and agreed before the sale, there can be no doubt. (The testimony on this point is here examined.)

The answer of Mr. Haines shows very plainly, I think, the same thing.

The testimony shows that it was known among the agreeing Hamburgh creditors, when the agreement among themselves was drawn, that Pratt's name could not be safely put in that writing, and that it was considered that it would vitiate the sale.

There was good reason for the caution used in not putting Pratt's name in the writing, as lessee, with the privilege of purchasing. But he was to be the man, and he and the agreeing creditors so understood it. And the lease with the said privilege was, accordingly, afterwards executed to him.

There was, then, an understanding before the sale, which prevented a fair competition at the sale, and resulted in the

---

Hamburgh Manufacturing Co. v. Edsall.

---

sacrifice of the property. It is not necessary to advert particularly to what was said before the sale commenced, and while it was going on, to persons attending the sale, to prevent their bidding. Enough was done and said to effect the object of these agreeing creditors ; and it was effected.

Under such an arrangement, and in view of the effect produced by the arrangement, the sale of the Clinton farm was unlawful as against the Clinton company and its creditors ; and the sale of the Hamburgh property unlawful as against the Hamburgh company and its creditors. It would not only be disastrous in its consequences, but it would be a reproach upon the courts, to allow property to be sacrificed at sales on executions, by means of such arrangements to prevent fair competition.

It is unnecessary to consider that part of the argument for the defendants based on the idea of Pratt's abandonment. The sale was unlawful from what passed before the sale.

The Hamburgh property, as before stated, was to be sold on five executions at law, of which Edsall's was the oldest. The purchaser at the sheriff's sale would get the property free from the liens of these executions, and subject only to the mortgages. Under the arrangement made between the agreeing Hamburgh creditors, among themselves, and between them as a body and Pratt, the furnace lot of fifty acres was struck off at \$26 ; the lot of woodland in Vernon and Hardiston, of seventy acres, at one dollar ; another wood lot in Vernon, of one hundred and seventy-five acres, at one dollar ; another wood lot in Vernon, of fifty-five acres, at fifty-five cents ; another wood lot in Vernon, of one hundred and seven acres, at eleven dollars ; another wood lot in Vernon, of forty-five acres, at sixty-five dollars ; another wood lot in Vernon, of nine hundred acres, at sixty-eight cents ; and a lot in Hardiston, of one and a half acres, on which was a storehouse and other improvements, at \$180 ; so that the sale of all these eight tracts brought but \$285 for the judgment creditors, neither of whom was a party to the arrangement, nor present at the sale, except Edsall ; and his debt was, by the terms of the arrangement, to be paid.

Joseph Sharp attended the sale, for the purpose, as he says, of buying the lot on which he had a mortgage, with the view of saving the expense of a foreclosure. He says he did not bid

---

Hamburgh Manufacturing Co. v. Edsall.

---

because he was told at the sale, by the creditors, that it was agreed that L'Hommedieu should buy the property for the benefit of the creditors and the company; in another part of his testimony he says for the benefit of the creditors and Pratt. He says his chief conversation on the subject was with Robert Lewis, Joseph M. Brown, and William Edsall, all creditors who had signed the agreement, and none of them having judgments against the Hamburgh company. Edsall, too, had mortgages on different parts of the Hamburgh property, and had the same inducement to bid, had it not been for the arrangement.

The effect of the arrangement and the sale under it, on the Hamburgh judgment creditors, was to displace their liens, and substitute for the liens of their judgments, a lien for the book accounts of the agreeing Hamburgh creditors, in the shape of a title in their trustee, L'Hommedieu.

Again, Edsall had the first judgment lien. Would he have allowed all these Hamburgh lands to be struck off to L'Hommedieu at such bids, but for the arrangement that was made? By that arrangement he was to get the amount of his judgment. By the agreement, the debts of the agreeing creditors, of which he was one, were to be paid out of the lands, including the Clinton mine farm, or out of the money which was to be raised by mortgage on the Hamburgh property and the Clinton farm.

The case appears to me to be very clear against the defendants. They cannot hold these properties against these companies and their respective creditors. Nothing can be done by the court in this suit, and with the parties we have before us in it, in reference to the Clinton mine farm. It cannot go to Pratt. It would be as unavailable to the Clinton creditors in his hands as where it now is. Nor can it go to Pratt's assignees under the insolvent act, to pay his individual debts. And the receivers of the Clinton company are not before us in this suit. As to the property of the Hamburgh company, it will be declared that L'Hommedieu holds it in trust for the creditors and the company; and it will be referred to a master to take an account of the issues and profits of the property, and of the debts; and all further directions will be reserved until the coming in of the master's report.

REVERSED IN PART, 1 *Hal. Ch.* 658; *Same case*, 3 *Hal. Ch.* 298; 4 *Hal. Ch.* 141.

CITED in 1 *Beas.* 406.



# CASES IN CHANCERY.

MARCH TERM, 1846.

---

## CORNELIUS WINTER AND WIFE v. BENJAMIN GEROE AND WILLIAM I. STAGG.

1. On a sale of land by a fiduciary, he cannot buy, either directly or through another.

2. Proofs on which it was determined that one to whom land was struck off at an executors' sale bought for the executors.

---

The bill states that on the 18th of May, 1843, Daniel Geroe died, leaving a large personal and considerable real estate, and leaving a will dated December 15th, 1836, by which, after bequeathing his personal estate, he gave to his wife the house and lots where he then lived, as long as she should remain his widow, and to his son, Benjamin Geroe, the mountain lot in fee; and the remainder of his real estate to his three children, Peggy, wife of Cornelius Winter; Caty, wife of William I. Stagg, and his son Benjamin, equally, in fee, to be divided or sold as two out of the three could agree; and appointed said Stagg and Benjamin Geroe executors of the will, who proved the will. That in the fall of 1843, the complainant Cornelius Winter, and the defendants, Benjamin Geroe and William I. Stagg, met for the purpose of dividing the real estate, when they, the said defendants, requested the complainant to make a division thereof into three parts, and that the complainant thereupon divided it accordingly, as equally as he could; but inasmuch as he, the complainant, thought that one of the parts was more valuable than either of the others, he proposed that the person who

---

Winter v. Geroe and Stagg.

---

should take that share should pay to each of the others \$66.66, to equalize the shares; and that while they were so together, the complainant being desirous of making a division amicably, offered that the other two should each choose a share, and that he would take the remaining one. That Stagg then chose a share, but that Geroe then refused to choose a share and declined making such division; and that since that time, Stagg and Geroe have made no further attempt to divide the lands.

That Stagg and Geroe, as executors and devisees, afterwards advertised the lands for sale at public vendue, on the 18th of January, 1844, at the house of John C. Ackerson, innkeeper in Manchester, Passaic county. That the complainants, Winter and wife, not believing that Stagg and Geroe, after the said proposition made to them by Winter, would sell the property, did not attend the sale.

The bill charges that Stagg and Geroe, to deprive the complainants of the property and get the benefit thereof to themselves, did, on the said day, strike off to one J. J. Goetschius, who attended the sale as their agent, a part of the lands, and did, with the wife of said Stagg, execute a deed to Goetschius for four lots, (describing them,) being parts of said real estate; which deed purports to be given by the said Stagg and Geroe, as executors as aforesaid, and Caty, wife of said Stagg, and as devisees under the said will. That the deed is dated January 20th, 1844, and purports to be for the consideration of \$1035. That Goetschius, with his wife, did thereupon, on the same day, execute and deliver to the said Benjamin Geroe a deed for the first and third of the said lots, purporting to be given for the consideration of \$600, and a deed to Stagg for the second and fourth of said lots, purporting to be given for the consideration of \$465; and that said deeds are both quit-claim deeds, without any covenants. That the said sale was made to Goetschius as the agent of said Stagg and Geroe, and that he conveyed the property to them in pursuance of an agreement made previous to the sale to him. That the sale was made at about half the value of the land; and that the same was so arranged by Stagg and Geroe, for the purpose of getting complainants' right in the property at less than its fair value, and in fraud of the complainants. That no money was paid by Goetschius, but

---

Winter v. Geroe and Stagg.

---

that the sale to him, and the price mentioned in the deed to him, were intended to deceive the complainants, and induce them to believe that the sale was *bona fide*.

The bill prays that these deeds may be declared to be void, and that Stagg and Geroe may be decreed to convey the property to such persons as the court may direct, or to convey one-third part thereof to the complainants; and that the property may be sold or divided under the order of the court.

The defendants put in their joint and several answer. The answer, so far as it is necessary to state it, says that one lot was struck off to Alyea, and three lots to Goetschius. That the bid of Alyea was then and there declared by him to be for the benefit of Goetschius, who then and there signed the conditions of sale and received a deed for the four lots. It denies that the sale was fraudulent and intended to injure Winter and wife, but alleges that it was made in good faith. Denies that the property, so as aforesaid sold to Goetschius, was sold to him as the agent of the defendants, or either of them; or that Goetschius attended the sale as such agent; and denies that the part bid off by Alyea, and by him transferred to Goetschius, was sold to him or Goetschius as such agent; or that Alyea attended the sale as such agent; and says there was no agreement, express or implied, between Goetschius and Alyea, or either of them, and the defendants, or either of them, or any person on their or either of their behalf, that Goetschius and Alyea, or either of them, should give to the defendants, or either of them, or to any other person, the property by them purchased at the sale, or any part thereof, or that the defendants, or either of them, should take such property from them, Goetschius and Alyea, or either of them. It denies that the said sales and conveyances were made pursuant to any agreement entered into prior to the public sale, and denies that the property was sold at public sale at a very low price, at about half its fair value, though they admit that they considered it cheap at the prices for which it sold.

The substance of the testimony is as follows:

C. S. Van Wagoner, for the complainants.—Shortly before the sale he told Stagg and Geroe they might sell the property, but could not buy it themselves; that if it would not bring



---

Winter v. Geroe and Stagg.

---

enough to warrant its being sold to others, it might be well to get some person to bid it off, till a fair and amicable settlement could be made with Winter; that after the sale Geroe called on him and said that, for the parts of the property that had been bid off to Alyea and Goetschius, the deeds were to be made out to him (Geroe) and Stagg, and asked whether that could be done; he first told Geroe he thought it could, but it would be necessary for Alyea and Goetschius to assign their rights, on the conditions of sale, to them; after a little reflection he told Geroe he thought it would be altogether illegal; that if Alyea and Goetschius had bought the property for the purpose of retaining it, the title should be made to them, and if the title was made to them, and by them immediately to Stagg and Geroe, he did not think it would stand law, even if the sale had been *bona fide* to Alyea and Goetschius; he told Geroe their best way was to make out the deeds to the purchasers as they appeared on the list of sales; he asked Geroe whether Alyea and Goetschius had paid any percentage; Geroe said not; that he did not think it worth while; that their object was to get the estate settled; that they were at any time willing to do what was right with Winter; from the conversation, witness took it that Alyea and Goetschius had bought in the property for Stagg and Geroe, though Geroe did not say so in so many words; he did not allege that Alyea and Goetschius had bought on their own account; Geroe said, "We'll take deeds and risk it; we have taken advice upon it;" the subject of conversation between him and Geroe was whether the sale would be valid if it went to Alyea and Goetschius, and from them direct to Stagg and Geroe; witness understood from the conversation, and from what had transpired between witness and Geroe, that the property had been bid in by Alyea and Goetschius for Stagg and Geroe.

J. J. Goetschius, called for the defendants.—He attended the sale and "purchased" several lots (mentioning them); "bid them off at public sale;" he did not attend the sale as agent for anybody; there was no agency—not in his mind, as he considered it; before the sale, and he thinks on the forenoon of the day of sale, he saw Stagg, and Stagg asked him whether he was going to the sale; he thinks he told him he did not

---

Winter v. Geroe and Stagg.

---

know whether he should or not ; Stagg told him he had better go, as he, Stagg, expected the sale would go on, and if deponent bought any property there that was cheap, he, Stagg, would take it off his hands ; witness, in speaking of agency, has reference to this conversation ; if there was any agency it was that ; witness did not consider it any agency ; he considered that if he bought the property he was at liberty to keep it, or to let Stagg have it ; when he bid off the property, he had an idea that Stagg would take it from him ; he did not bid it off as agent ; he thought the property was cheap ; yet he had an idea that Stagg would take it from him ; and if he would not, witness would keep it himself, as it was cheap ; he did not consider himself in any way bound to give the property up to Stagg ; Stagg was not bound to take the property from witness, any further than he said if witness bought it cheap he would take it ; witness did not consider that Stagg was bound to take it by what he said ; witness does not think nor remember of anything else that passed between him and Stagg or Geroe, about the property, before the sale ; after the sale, witness took a deed for the property struck off to him, and also for that struck off to Alyea, from Stagg and his wife and Geroe ; he is under the impression that on the same day of the sale something was said to him by Stagg and Geroe about their taking the property, but he cannot recollect exactly what it was ; no conclusion was come to between them on that day ; by conclusion, he means they made no bargain, confirmed nothing ; nothing was done by which he was bound to give the property up to them ; nothing further passed between them, in relation to the property, till the deed was given, that he can now remember ; he does not remember of any positive agreement to let them have the property, only the delivery of the deed ; there was none before then.

Cross-examined.—He cannot now recollect whether he executed one or two deeds. (It was here admitted by the parties that the property bid off by Alyea was conveyed by this witness, Goetschius, to Geroe.) The witness says it seems to strike him that something was said to him, by Stagg and Geroe, on the day of sale, about their taking the property, but does not remember what was said ; does not remember refusing to let

---

Winter v. Geroe and Stagg.

---

them have it ; when they came to him, on Saturday, after the sale, at his store, the deed or deeds were already drawn, and were brought there to be executed ; they paid him no more money for the property than he gave ; he did not pay anything for the drawing or acknowledging of the deeds ; Stagg and Geroe paid or gave him a small compensation for his trouble—two dollars ; he thinks he would have gone to the sale if Stagg had not spoken to him about it, but is not positive ; he did not ask any compensation, but they gave him two dollars ; the deeds were brought to deponent's store by Stagg and Geroe, to be executed by him ; he does not exactly remember whether the two dollars were given to him or his wife ; it was his intention they should go to his wife ; it was entirely gratuitous.

David J. Alyea, sworn for the defendants.—He bought a lot ; it was struck off to him for \$410 ; he did not attend the sale as agent for Stagg and Geroe, or either of them ; did not bid off that lot as agent for them, or either of them ; there was not, before the sale, any agreement, understanding or arrangement between him and Stagg and Geroe, or either of them, that they should take the lot struck off to him ; in making his bid and purchasing, he acted entirely on his own responsibility ; after the lot was struck off, Goetschius took his bid ; this was not the day of the sale, but a day or two afterwards, as near as he can recollect ; Stagg had then spoken to him, and offered to take the lot off his hands ; this was after the day of sale ; he transferred the bid to Goetschius at Stagg's request ; Stagg or Geroe had not requested him to attend the sale, more than that one of them told him the property was to be sold on a certain day ; when he went to the sale he did not intend to bid ; did not know that he should be a purchaser ; he was induced to bid because he thought the lot cheap ; no person, on that day, or at the sale, requested witness to bid for him ; he did not receive any hint or intimation from any person, either before, or at, or during the sale, that if he bought, what he bought would be taken off his hands ; when the lot was struck off to him he expected to keep it, to the best of his knowledge ; he did not, while bidding, expect the bid to be taken off his hands by either Stagg or Geroe ; Stagg came to him, while bidding, and asked



## Winter v. Geroe and Stagg.

him who he was bidding for; he told him he was bidding for himself; Stagg did not give him anything for his bid; he did not pay the percentage; he was not called on to do it; he did not sign the conditions of sale; does not think he was asked to do so; did not sign any written transfer of his bid to Goetschius; it was done verbally; he does not recollect signing any transfer of his bid.

Henry M. Speer, sworn for the complainants.—He was at the sale; directly after the sale, he told Alyea he had bought that property cheap, and asked him what he would take for his bargain; Alyea said he did not know; witness told him he could find a man who would give him \$150 in cash for his bargain; Alyea asked who it was; witness told him it was Mr. Myers; Alyea did not say whether he would take it or not; at another time he asked Alyea whether he bought the property for himself or not; he said no—he bought it in for them; at the first conversation with Alyea, witness went in to see what he would take for his bargain, and told Alyea that Myers would give him \$150 for his bargain; when Alyea said he bought it in for *them*, he did not mention any names, but deponent supposed he meant Stagg and Geroe.

The conditions of sale were dated January 18th, 1844, and are signed by Stagg and Geroe, as executors, &c., of Daniel Geroe, deceased. The following endorsement appears on the conditions of sale. "I have purchased at sale within-named lot No. 2 on a map made by C. S. Van Wagoner, for John J. Goetschius. January 18, 1844. DAVID J. ALYEA."

A. S. Pennington, for the complainants. He cited 1 *Coxe's N. J. Rep.* 26; 8 *Vesey* 345-6-8; 3 *Brown's Ch.* 119; 3 *Har. Rep.* 81; *Sawyer on Trusts* 376, 390; 1 *Wil.* 320.

D. Barkalow, for the defendants. He cited 2 *Hill* 434; 2 *Caine's Cases in Error* 183; 3 *Paige* 178; 3 *Ves., Jr.*, 740, note.

THE CHANCELLOR. There is no controversy as to the law of the case made by the bill. It is within the principle, that on a sale by a fiduciary, he cannot buy either directly or through

---

Winter v. Geroe and Stagg.

---

another. The question raised and argued is, whether from the bill, answer and proofs in the cause, it appears that the defendants, Stagg and Geroe, who made the sale, did, through another, buy the property themselves. It is a question of fact.

If the answer is to be taken as a full denial, (perhaps the imperfection which is discoverable in it was not intended,) I think it is overcome by the testimony on the part of the complainants and the corroborating circumstances.

The sale was made on the 18th; on the 20th the deed to Goetschius, and the deeds from him to Stagg and Geroe were made and delivered. They were all prepared by the defendants, and taken to Goetschius' store to be executed by him. Two dollars were given to Goetschius or his wife for his trouble, and nothing passed between Goetschius and the defendants after the sale, till the deeds were given.

These are all strong circumstances. The bill is supported by the testimony of Van Wagoner, called for the complainants; and the testimony of Goetschius, though called for the defendants, is clearly and strongly in support of the bill. The credit of Alyea, called for the defendants, is impaired by a discrepancy in his own testimony, and by the testimony of Henry M. Speer, sworn for the complainants, who says that in conversation with Alyea, shortly after the sale, he told Alyea that Myers would give him \$150 for his bargain; that Alyea said nothing at that time in answer. That at another time, he asked Alyea if he had bought for himself, and he answered no, he had bought for them; meaning, as witness understood it, Stagg and Geroe.

I think this is a case which calls for the judgment of the court in support of a principle which the policy of the law requires should be strongly maintained. It would be of dangerous tendency to be lax in the application of this principle. It would encourage cunning and dissimulation, and a resort to unworthy devices to cheat the law.

The sale will be declared void.

REVERSED on question not raised before the Chancellor, 1 Hal. Ch. 655.  
CITED in *Blauvelt v. Ackerman*, 5 C. E. Gr. 146.

## WILLIAM BLAIR v. JAMES J. M'DONNELL.

Relief granted where, by mistake of both seller and buyer, the deed did not cover the lands intended to be sold and bought, and money paid on account of the purchase decreed to be repaid, and the bond and mortgage given by the purchaser to be canceled.

On the 18th of March, 1842, James J. M'Donnell conveyed to William Blair two lots in Harsimus, by the following description: "All those two lots of land in Harsimus, in the county of Hudson, being part of block No. 150, on a certain map or chart of Harsimus made by J. A. Mangin, and recorded in the office of the clerk of Bergen; on which block the said two lots may be known as lots numbers 19 and 20, each lot being 25 feet wide in front and rear, and 100 feet deep," for the consideration of \$1000, with covenants of seizin and warranty. Blair, on the same day, gave his bond to M'Donnell for the \$1000, payable in two years, with interest; and, with his wife, executed to M'Donnell a mortgage on the lots described in the deed, to secure the bond. On the same day, Blair paid M'Donnell \$200 of the money, and it was endorsed on the bond.

These two lots, described in the deed and mortgage, fronted on Erie street, extending from front to rear in a line parallel with South Seventh street, and fifty feet distant from that street. The block No. 150, is 400 feet long, between Erie and Grove streets, and 200 feet wide, between South Sixth and South Seventh streets; and, on the map referred to, there are laid out eight lots of 25 feet wide and 100 feet deep, fronting on Grove street, occupying the whole front of the block on that street; and eight lots of the same width and depth fronting on Erie street, occupying the whole front of the block on that street; leaving two tiers of lots, of eight lots in each tier, of the same front and depth, one tier fronting on South Sixth, and the other on South Seventh street. Lots 17 and 18 on the map lay between the lots described in the deed and South Seventh street, and fronted on Erie and South Seventh street, and extending in depth, along South Seventh street, 100 feet.

During the negotiation between M'Donnell and Blair, M'Don-



---

Blair v. M'Donnell.

---

nell took Blair to the corner of Erie and South Seventh streets, and showed him the ground he proposed to sell to him, and represented it as comprising two lots adjoining each other, in all, 50 feet front and rear, and 100 feet deep, fronting on South Seventh street, and bounded by the easterly line or side of Erie street; and that the said lots formed the southwest corner of block No. 150, on the said map made by Mangin. M'Donnell told the complainant there was no necessity for his being at any trouble or expense in making searches for the title of the said premises, or for any encumbrances thereon, and referred him to Mr. Cassidy for information in reference thereto. Blair accordingly applied to Mr. Cassidy, and was told by him that the title was good; and Blair, being satisfied with these representations, took the deed, and gave the bond and mortgage.

After receiving his deed, Blair made preparation to build a house on the premises, and caused a quantity of building materials to be conveyed to what M'Donnell had represented to be the front of the lots he bought; when he was told that the lots 19 and 20 described in his deed, did not front on South Seventh street, nor form the southwest corner of Erie and South Seventh streets; but that they front on Erie street, and are 50 feet distant from South Seventh street.

Blair filed his bill, stating the foregoing facts, and praying that M'Donnell may be decreed to repay the \$200, with interest thereon, and to give up the bond and mortgage to be canceled, on the complainant's releasing to him all his interest, &c.

M'Donnell put in his answer, stating that, on the 1st April, 1835, one Hutton bought from the Messrs. Coles the four lots, 17, 18, 19, 20, as laid out on said Mangin's map. That, on the 18th August, 1836, Hutton conveyed to one Israel Champion the two of the said lots which are marked 17 and 18. That Champion built and enclosed, fronting on South Seventh street. That, on the 15th October, 1839, J. C. Terhune, sheriff, on an execution against Hutton, sold the other two of the four lots, viz., 19 and 20, to the defendant for \$1500. That the deed from the sheriff to him describes as thereby conveyed, two lots bought by Hutton of the estate of Coles, numbered 19 and 20, southwest corner of block No. 150, on the said Mangin's map. The defendant admits that he represented and pointed

---

Blair v. McDonnell.

---

out to the complainant, as stated in the bill, that the lots fronted 50 feet on South Seventh street, and extended along the easterly side of Erie street 100 feet, and formed the southwest corner of block 150. He says that at the time of the said sale and conveyance by him to the complainant, the space of 50 feet front by 100 feet deep, fronting on South Seventh street, was enclosed by a fence, and had been previously cultivated by Hutton. That the four lots bought by Hutton from the estate of Coles, formed one parcel of 100 feet square, being the southeast corner of block No. 150; that they are known as lots 17, 18, 19 and 20, on said Mangin's map; and that it was supposed and understood by Hutton, when he bought them, as the defendant has been informed and believes, that they were numbered on South Seventh street, instead of on Erie street, as laid down on said map; and that in pursuance of that belief on the part of Hutton, Hutton sold and conveyed to Champion numbers 17 and 18, which both Hutton and Champion understood and believed fronted, and were numbered, on South Seventh street; and that, in accordance with that understanding and belief, Champion built a house and stable and other necessary buildings upon, and enclosed a space of 50 feet by 100 feet, embracing the rear half of said four lots, as they are laid down and numbered on the said map, the house and stable fronting on South Seventh street; and that Champion has occupied the said space for more than nine years; and that Hutton, after his conveyance to Champion, retained possession of the other half of said space, considering it as lots 19 and 20, numbered on South Seventh street, up to the time of the sale by the sheriff as aforesaid, when the defendant bought under the full belief that lots 19 and 20 fronted on South Seventh street, and included the corner of said block, and extended 100 feet on Erie street; and that he sold and conveyed to the complainant under the same belief. That at the time Champion applied to Hutton for the purchase of two lots on said block 150, he was desirous of buying the two lots which (considering the four as numbered on South Seventh street) formed the southwest corner of the block, but Hutton refused to sell them, though Champion offered him \$200 more for them than he paid Hutton for the lots he bought; and that the defendant was present at the conversation.

---

Blair v. McDonnell.

---

The defendant submits to the court whether the deed from him to the complainant is not a good and valid deed, to pass the title of the part intended to be conveyed and bought, inasmuch as the different grantees bought believing the lots to be numbered on South Seventh street, especially as there was no fraud in the matter, but merely a mistake as to the numbering of the lots.

The proofs taken show the facts to be as they may be sufficiently gathered from the bill and answer.

*Bentley*, for the complainant. He cited 1 *Story's Eq.*, §§ 141, 142, 155, 156, 193; 2 *Ibid.*, §§ 192-4.

*M. Ogden, contra*, cited 1 *Story's Eq.*, §§ 110-12.

THE CHANCELLOR. This is, no doubt, a case of mutual mistake. There is no ground for a charge of fraud in the defendant. The mistake was not in reference to the land which the defendant proposed to sell, and the complainant to buy. That was well understood by both parties; it was 50 feet front and rear, on the southwest corner of block 150, fronting on South Seventh street, and extending along the easterly side of Erie street 100 feet. The mistake was in supposing that a deed for lots 19 and 20, as numbered on Mangin's map, would convey what the one proposed to sell and the other to buy.

It is claimed, on the part of the defendant, that from the manner in which Champion enclosed and built, it must be taken that his purchase from Hutton was of 50 feet fronting on South Seventh street, and extending, in depth, across the rear half of the four lots, 17, 18, 19 and 20. It is true that Hutton, owning the 100 feet square, might have sold as he pleased, fronting either on South Seventh or on Erie street; and if he sold to Champion the lot as now enclosed by him, the residue of the 100 feet square might have been considered as having passed by the sheriff's deed to the defendant; in which case, a reformation of the deed from the defendant to the complainant would have been the proper relief. But the deed from Hutton to Champion conveyed lots 17 and 18, as laid down on Mangin's map.



---

Taylor v. Thomas.

---

It may be that, notwithstanding that description, sufficient might be shown to establish that Hutton intended to sell and Champion to buy the lots as now enclosed by Champion; and to induce the court, in a proceeding between the proper parties, to reform that deed. But that cannot be done in this suit. Champion, notwithstanding the manner in which he has enclosed, claims title according to the description in his deed; and that covers half of the land in reference to which M'Donnell and the complainant dealt. To reform the deed from M'Donnell to the complainant, and leave the complainant to rely on confining Champion's title to the lot he has enclosed, would not be the measure of relief to which the complainant is entitled. It would put the complainant in the position of having bought a lawsuit with Champion; a thing which he certainly never consented to, and which the defendant never intended to impose on him. The relief sought by the bill is the proper relief in the case.

Decree accordingly.

---

GRIFFIN TAYLOR v. GEORGE C. THOMAS AND WIFE, AND  
SOPHIA CRITTENTON.

1. Between two mortgagees, neither having notice of the other's mortgage, the mortgage first recorded has preference, though the other was first executed, and had been foreclosed, and the holder of it had bought the mortgaged premises at the sale under the decree in the foreclosure suit; the holder of the mortgage first recorded not having been made a party in that suit.

2. On a bill by the holder of the mortgage last given, but first recorded, denying notice of the mortgage prior in date, and answer averring notice, and replication, the cause being brought to a hearing on bill, answer and replication, it was decreed for the complainant.

---

The bill is for the foreclosure of a mortgage, dated February 25th, 1839, given by George C. Thomas and Anna, his wife, to Griffin Taylor, recorded February 27th, 1839. The mortgage covers two distinct lots. The bill states that the complainant has discovered the record of a mortgage on the lot se-

---

Taylor v. Thomas.

---

condly described in his bill, purporting to have been made by said Thomas and wife to Sophia Crittenton, dated April 1st, 1826, but that the said mortgage was not registered till July 3d, 1840; and that he had no notice or knowledge of the existence of the mortgage of the said Sophia at the time of the making and recording of the mortgage to him. That the complainant has discovered the record of a deed from the sheriff of Essex to the said Sophia, dated January 21st, 1843, conveying to her the lot mentioned in her mortgage; and that it appears by that deed that it was made by virtue of an execution issued on a decree of this court, for the foreclosure of the said mortgage of the said Sophia, and the sale of the lot described therein, in a suit in which the said Sophia was complainant, and the said Thomas and wife, and others, were defendants; but that he, Taylor, was not made a party to that suit, and had no notice of it.

The defendants put in their joint and several answer. They admit the bond and mortgage to the complainant, and the registry thereof, as stated in the bill, and that the mortgage to Sophia Crittenton is dated and was registered as in the bill is stated. They admit the foreclosure of the mortgage to Sophia Crittenton, and the sale of the lot mentioned therein, by the sheriff of Essex, under the decree of this court, and the purchase thereof by her at the sheriff's sale. And the defendants say that though the said mortgage to the said Sophia was not registered for several years after it was executed, the fact of its existence was known to the family of the said Thomas, and the interest thereon was paid from time to time; and that the failure to have it registered was on account of the ignorance of the said Sophia of the necessity of having it registered. And the said Sophia says she has always understood and believed, and she so charges, that the complainant, at the time of the execution and delivery of his mortgage, was informed and had full notice of the mortgage. And she says she is informed and believes, and so charges, that it was the intention of the said George C. Thomas, when he gave the mortgage to the complainant, to include therein only the first lot therein mentioned, and not the lot which had been previously mortgaged to her; and that in the suit for the foreclosure of her mortgage, the complainant was not made a party, because neither she nor her counsel sup-

---

Taylor v. Thomas.

---

posed, or had any idea that his mortgage covered any part of the land covered by her mortgage. And the defendant George C. Thomas says that the mortgage to the complainant was given on a compromise of an old disputed claim, and was intended to be given, and so understood by the parties at the time, on the first lot therein contained, and that it was not the understanding or intention of the parties, at the time of making the mortgage to the complainant, that it should include any part of the land mortgaged to the said Sophia.

*A. S. Hubbell*, for the complainant.

*J. J. Chetwood*, for the defendants.

THE CHANCELLOR. This cause was brought to a hearing on the bill, answer, and replication, no testimony being taken on either side.

The mortgage of the complainant is entitled to priority. It was on the defendant to show that the complainant had notice of the mortgage prior in date, by proof either of actual notice, or of circumstances from which notice could be inferred.

The foreclosure of the prior mortgage cannot affect the rights of this complainant, he not having been made a party in that suit.

Decree accordingly.



---

Receivers of Mechanics' Bank v. Godwin.

---

THE RECEIVERS OF THE MECHANICS' BANK OF PATERSON  
v. CALEB M. GODWIN ET AL.

In 1832, G. and B., partners, leased a building and water-power, and put machinery into the building, for the purpose of carrying on their partnership business. In 1834, G. gave a mortgage on his interest in the mill and machinery, as security for his individual debt. A bill was filed in July, 1840, for the foreclosure of the mortgage and the sale of G.'s interest. The lessor was made a defendant. The parties continued in the possession and use of the mill and machinery. At the time of the filing of the bill, and at the hearing of the cause, there was rent due from the partnership to the lessor. *Held*, that the mortgagee was not entitled to G.'s interest in the machinery, free from the rent, but that the interest which the complainants were entitled to, and which could be decreed to be sold under their mortgage, was only what G. would be entitled to after paying the debts of the partnership, including the rent.

The material facts of the case sufficiently appear in the opinion delivered.

A. *Whitehead*, for the complainants.

E. B. D. *Ogden*, for the defendants. He cited *Story on Partnerships* 136, 373; 4 *Vesey, Jr.*, 396; 17 *Ib.* 194; 6 *Mass. Rep.* 242; 2 *Ld. Raymond* 871; 2 *Green's Rep.* 8.

THE CHANCELLOR. On the 1st of August, 1832, Roswell L. Colt leased mill lot No. 2, on the upper canal at Paterson, with the privilege of using a foot square of water, to Caleb M. Godwin and one John Benson, then and still partners, under the name and firm of Benson & Godwin, for twenty-one years, at the rent of \$1200, payable quarter-yearly. The business of the said partnership was the conducting of a cotton-mill on the said lot, by means of the water-power and the use of machinery in the mill. After the making of the lease, Colt conveyed the lot, buildings, and privileges to the Society for Useful Manufactures, and at the same time assigned to them the said lease.

On the 6th of October, 1834, Caleb M. Godwin, one of the partners, being indebted to the Mechanics' Bank of Paterson, in

---

Receivers of Mechanics' Bank v. Godwin.

---

\$6066, gave to them his bond for that sum; and to secure the same, he, with his wife, executed a mortgage of the same date, to the said bank, on certain lots in Paterson and on his interest in the said cotton mill and the machinery therein.

The bill is filed for the foreclosure of this mortgage, and the sale of Godwin's interest in the said mill and machinery, that is to say, of his partnership interest in the said lease and machinery. It prays for a sale of the *mortgaged premises*, and that, from the proceeds of the sale, the complainants may be paid principal and interest.

I see no objection to the relief prayed by this bill; the mortgagees are certainly entitled to have the mortgage foreclosed, and the mortgaged premises sold, that is, the interest of the partner Godwin in this partnership property. I do not see that, under this bill and the prayer of it, the court have now anything to do with the question what will be the effect of such sale, and what interest the purchaser will acquire. But the complainants, in their bill, claim that they are entitled to have the interest of Godwin sold for the payment of their mortgage, free from any claim for rent accrued since the date of their mortgage; and the Society for Useful Manufactures, to whom Colt, the lessor, conveyed the reversion and assigned the lease, have put in an answer, stating that on the 1st of February, 1840, (the bill was filed in July, 1840,) there was due to them from Benson and Godwin, for rent in arrear, \$3082.19; (there appears to be now due them for rent in arrear upwards of \$2600;) and they insist, in their answer, that the rent in arrear is a lien on all the goods and chattels of Benson and Godwin on the demised premises, notwithstanding the complainants' mortgage; and that no decree should be made for the sale of the said goods, till the lessees, or the complainants, pay the society the rent in arrear; or that if a decree be made, it should be so made that the arrears of rent be paid out of the proceeds, with all rent which shall accrue up to the removal of the goods from the premises; and insisting, further, that if the complainants have, under the said mortgage from Godwin alone, acquired any interest in the goods, yet, inasmuch as they took the same as security for an individual debt of Godwin, such interest is subject to the liability of said goods for the partnership debts of Benson and

---

Receivers of Mechanics' Bank v. Godwin.

---

Godwin. The society deny all knowledge of the complainants' mortgage till after the filing of the bill ; and insist further, that the mortgaged property being personal, whatever conveyance thereof Godwin made to the complainants was unaccompanied with possession, either actual or constructive, and was without any notice to them, and void as against them, they being creditors of Benson and Godwin ; and that the complainants having left the goods in the possession and use of Benson and Godwin, on the demised premises, without giving to the society, the landlords, any notice of their claim, and having allowed Benson and Godwin to use the property as their own, and to exercise acts of absolute ownership over it, it would be unjust to the society, if the interest which Godwin had in the property at the time of the assignment of the lease, should be relieved from liability for rent which has accrued to the society, for the enjoyment of the demised premises in running and using the same machinery and property thereon. And the society further insist that if the complainants' claim shall be decreed to be valid and to pass the title to said machinery and goods out of Godwin to the complainants, then the complainants, by keeping it on the premises, have, for the purposes of *rent*, become the assignees of Godwin, of the said term in the demised premises, and have been and are the tenants of the society with the said Benson, and have thus subjected the said machinery and goods to liability for rent.

I think the state of these pleadings shows that the court might, with propriety, decline now to act, further than to make a decree for the sale of the mortgaged property, as prayed by the bill, and leave the parties, beyond that, to the operation and effect of the law applicable to the subject. Indeed I do not see what other decree the court can make. Can we say that the rent shall be paid out of the proceeds of the sale of Godwin's partnership interest in these goods ? What is his interest ? And, from the liability of partnership property to the payment, first, of partnership debts, how could we say that the rent should be paid out of his interest alone, when the interest of Benson in the same goods is equally liable for the rent ? On the other hand, how can we say, under the prayer for the sale of Godwin's interest in these goods, which is a partnership interest,



---

Receivers of Mechanics' Bank v. Godwin.

---

subject to the debts of the firm, and without knowing how the firm stands, or what debts they owe, or when they accrued, order Godwin's individual half of these goods to be sold, free from all debts of the firm, and the proceeds to be applied to pay the complainants' demand against Godwin as an individual? But if it will be of any service to the parties, I am willing to express an opinion on the questions which were presented and argued by the counsel.

The first ground taken by the complainants' counsel is that, on the forfeiture of a mortgage of personal property, the mortgagee becomes the absolute owner, and may recover the property by replevin; and that as, in New Jersey, the property of a stranger, though on the demised premises, is not liable for rent, the complainants are entitled to the mortgaged property in this case free from the claim of rent; that it is simply the case of a lending of personal property by a stranger to a tenant, and that property so lent is not liable for rent; that the property is not that of the tenant, and the landlord, therefore, could not distrain it.

This position would not decide this case, if it were maintainable; for beyond this lies the question, what is mortgaged by a mortgage by one partner of his interest in the partnership goods to secure his individual debt? But I am not prepared to admit the correctness of the position. To test it, we must suppose this lease to have been made to Godwin alone, and the machinery to have been put in by him alone, and to have been afterwards mortgaged to the complainants, and to have been permitted to remain in the mill, in Godwin's possession and use, for years after default of payment. Would personal property so situated be considered the property of a stranger, and not liable for rent? To consider our statute as applying to a case like this, would be fraught with most serious mischief. As respects the landlord, at least, it would be considered the property of the tenant.

But the rent, in this case, is the debt of the partnership of Benson and Godwin, and the mortgage is to a separate creditor of Godwin, of Godwin's interest in the partnership property. The general doctrine applicable to such a state of things was admitted by the counsel of the complainants; but he contended that the interest so mortgaged would only be subject to the

---

Receivers of Mechanics' Bank v. Godwin.

---

partnership debts which existed at the time of the mortgage. I might here say again that the complainants, on taking a decree to sell the interest mortgaged, and selling it, would put themselves, if they bought, or the purchaser who should buy, on ground on which they or such purchaser might attempt to maintain this position before the proper tribunal and between the proper parties; and I do not feel called on to express any opinion about it. But I am willing to say that, as at present advised, I think the position cannot be maintained.

An absolute assignment by Godwin of all his interest in this mill and machinery, would have dissolved this partnership. 17 *Johns. Rep.* 525. Did this mortgage dissolve the partnership? I apprehend not; and it certainly was not so supposed or intended, either by Godwin or the complainants; on the contrary, the partnership and its business had ever since continued, and still continues, and the property, Godwin's interest in which was mortgaged, has ever since remained in the possession of the partnership, and in their use, on the demised premises, in their partnership business. This brings the case to the answer given to the first ground taken by the complainants' counsel. But, beyond this, the partnership has continued, and still continues, and that by the consent of the mortgagees.

They must be considered as assenting to a continuance of the partnership till they, by means of this mortgage, effect an absolute assignment of Godwin's interest in the property, and thereby effect a dissolution of the partnership. This they have had it in their power to do ever since Godwin's default in payment to them; and it would be extraordinary if they could now demand an account of the partnership as it stood ten years ago, and strike from the debit side all debts then existing against the partnership which have since been paid, and thus produce a balance due Godwin sufficient to satisfy them.

My opinion is, that the interest of Godwin to which the complainants will be entitled, will be that which, on a settlement of the accounts of the partnership, after the dissolution which will be effected by the sale under the complainants' mortgage, Godwin would be entitled to after paying the debts of the partnership.

Decree accordingly.

---

Tappan v. Redfield.

---

## WILLIAM TAPPAN v. GEORGE F. REDFIELD AND OTHERS.

An authority to another to execute for the owner, and in his absence, a deed for land, must be by deed.

Solomon Russ, of Conklin, New York, and George F. Redfield, of Perth Amboy, New Jersey, were, it is alleged, partners in trade, in the oyster business. They owned, as tenants in common, a tract of land in Middlesex county, New Jersey, of twenty acres, unconnected with the partnership business, and Redfield owned a lot in Perth Amboy. On the 1st of April, 1836, while Russ was in New York, at his residence, Redfield executed, in the partnership name of Russ & Redfield, a bond to the complainant, conditioned for the payment, by Solomon Russ and George F. Redfield, of \$400, with interest, in one year; and to secure the payment thereof, Redfield also executed, in the name of Russ & Redfield, a mortgage to the complainant on the said two parcels of land, Redfield's wife joining in the mortgage. The certificate of acknowledgment states that George F. Redfield, of the firm of Russ & Redfield, and Ann Maria his wife, appeared, &c., and acknowledged that they signed, sealed and delivered the mortgage as their act and deed.

The bill is filed for the foreclosure of this mortgage, and a decree is prayed for the sale of the whole twenty-acre tract.

To establish the mortgage as against Russ, the complainant relies on the allegation, and the proof he has offered to sustain it, that when Russ was at Amboy, a few months before the giving of the bond and mortgage, he and Redfield agreed that money should be borrowed for the use of the firm, from the complainant, on bond and mortgage; and that Russ, at that time, verbally authorized Redfield to sign the bond and mortgage for him.

*H. V. Speer*, for the complainant.

*Leupp*, for the defendant Russ.



---

Runyon v. Brokaw.

---

THE CHANCELLOR. It is not necessary to inquire whether this verbal authority is sufficiently proved; or whether, if the authority was sufficient, the mortgage was properly executed under it. The mortgage cannot be valid as against Russ. A freehold interest in land cannot pass by parol. 2 *Black. Com.* 297, 312; 12 *Johns. Rep.* 73. And an authority from the owner to another to execute for him, and in his absence, a deed for such an interest, must be by deed. 1 *Wend.* 424; 5 *Munro* 188; *Com. Dig.*, (*Attorney*), *ch. I.*, 65.

---

## EPHRAIM RUNYON, JR., v. CALEB C. BROKAW ET AL.

R. and B. were partners in two establishments, one for the tailoring business and the other for merchandizing. They dissolved, and submitted the matters in difference between them to arbitration, and entered into mutual submission bonds, with sureties. The arbitrators awarded that R. should pay the debts of the tailoring business, and pay B. \$468.10; and that B. should pay the debts of the merchandising business, in full of all demands by either against the other. After the award, two executions on judgments recovered against R. and B., for debts growing out of the merchandising business, were levied on the goods and lands of R. and B., respectively. R. obtained an injunction against selling his lands before the lands of B. It appeared by the answer, that R. had not paid to B. the \$468.10. On motion to dissolve the injunction, an order was made that R. pay the \$468.10 on the executions, within thirty days, or that the injunction be dissolved.

---

On the 4th of January, 1845, Ephraim Runyon, Jr., and Caleb C. Brokaw, being partners in two separate establishments, one for the tailoring business and the other for merchandising, submitted the matters in difference between them to arbitration, and entered into mutual submission bonds, with sureties.

On the 1st of March, 1845, the arbitrators published their award, by which it was awarded that Runyon should pay the debts which had grown out of the tailoring business and exonerate Brokaw therefrom; and that Brokaw should pay the debts which had grown out of the merchandising business and exonerate Runyon therefrom; and that Runyon should pay Bro-

---

Runyon v. Brokaw.

---

kaw, on or before the first of June then next, \$468.10, with the interest thereon from March 1st, 1844, in full of all demands by either against the other, to the date of the submission.

On the 25th of February, 1845, two judgments were recovered, in the Supreme Court, against Runyon and Brokaw; one for \$449.69, damages and costs, the other for \$379.64, damages and costs, on which judgments executions were issued, and levied, on the 3d of March, 1845, on the goods and lands of Runyon and Brokaw, respectively. The debts for which the judgments were recovered, grew wholly out of the business of merchandising, which, by the award, were to be paid by Brokaw.

On the 12th of April, 1845, Brokaw made an assignment, under the act, to John Burke, for the benefit of his creditors. There is no partnership property. Runyon filed his bill, stating that he has paid all the debts required by the award to be paid by him; that the property of Brokaw, assigned as aforesaid, is insufficient to pay his debts; that Brokaw's surety on the arbitration bond given by him is insolvent; that the sheriff sold his, the complainant's, personal property, and applied the proceeds thereof, \$113.43, towards satisfaction of the said executions; that the personal property of Brokaw was sold on prior executions and exhausted thereby; that a small part of the real estate of Brokaw was sold by the sheriff, and after satisfying prior executions a balance of \$53 remained in his hands, to be applied towards satisfying the two executions against Runyon and Brokaw. The bill charges that the real property of Brokaw levied on is more than sufficient to pay the two executions; that the sheriff has advertised the real property of both Runyon and Brokaw, under the two executions; and that the sheriff, by the direction of the plaintiffs in the executions, or of Brokaw and his assignee, intends to sell the real estate of the complainant, Runyon, before selling that of Brokaw. The bill prays an injunction, restraining the sheriff from selling the complainant's real estate before selling that of Brokaw, and applying the proceeds thereof to the payment of the executions; and that the complainant may be repaid the amount produced by the sale of his goods. The injunction was granted.

---

Runyon v. Brokaw.

---

The defendants put in their joint and several answer. It appears by the bill and answer, that Runyon has never performed that part of the award which required him to pay to Brokaw \$468.10. Burke, Brokaw's assignee, answering for himself, says that on the 2d June, 1845, he called on the complainant for that money, and told him that on its being paid, he would immediately apply it to the executions, and the complainant refused. That he then asked the complainant to pay the amount to the sheriff, to be applied to the said executions, and that the complainant refused; and that on the 11th November, 1845, he tendered to the complainant his bond of indemnity against the said judgments and executions, and demanded payment of the balance of said \$468.10, after deducting therefrom the amount of the said sales of the complainant's personal estate and that the complainant still refused to pay.

The defendants, Brokaw and Burke, answering for themselves, state that they think and believe that the circumstances of the complainant's surety in his arbitration bond are straitened; and that they have understood and believe that the complainant, prior to the said judgment, mortgaged his real estate so levied on for \$850; and that since the said judgments, he has again mortgaged it for \$730, and that it is not worth more than \$1600. And the said defendants say there are no debts against the said Runyon and Brokaw, arising out of their said business of merchandising, except the said two judgments and executions, and it is not charged in the bill that there is any other.

On this answer a motion was made to dissolve the injunction.

*W. Thompson*, in support of the motion, cited 1 *John. Ch. R.* 211, 244.

*A. Whitehead*, *contra*, cited 2 *John. Ch. R.* 554, 561; 4 *Ibid.* 123; 1 *Hill's Ch. R.* 351; 2 *Mad.* 434.

THE CHANCELLOR. The principle on which relief by injunction was sought by this bill was, that by the effect of the award the debts for which the two judgments were recovered and executions issued became, as between the complainant and



---

Hopper v. Sisco.

---

Brokaw, the personal debts of Brokaw, and that the complainant should be considered as only surety therefor; and that, in this state of things, Brokaw's property should be first sold.

Is the case within the principle contended for? Is it true that by the award itself, without performance on the part of Runyon, Brokaw became the principal debtor, and Runyon only security? I think not. The award was an entirety, each part depending on the other parts. Runyon was to pay the debts of the tailoring business, and to pay Brokaw \$468.10, and Brokaw was to pay the debts of the merchandising firm. Runyon has not performed his part, and is not in a position to ask the equitable interposition of the court; and particularly as that interposition would subject Brokaw's assignee and creditors to the risk of loss.

The most the court feels willing to do, is to make an order giving the complainant thirty days within which to pay to the sheriff, towards payment of the executions, the balance of the \$468.10, and interest from the date of the submission, after deducting the amount of the proceeds of sale of the complainant's personal property; but that, in default of such payment, the injunction be dissolved.

Order accordingly.

---

ANDREW P. HOPPER v. JOHN SISCO ET AL.

1. A recovery will not be allowed on a case proved if it differ essentially from the case made by the bill.

2. H. filed a bill against the devisees and executors of S., deceased, for the foreclosure of a mortgage given by S., in his lifetime, to H., in the ordinary form, to secure a bond conditioned for the payment of \$1200. The defendants set up in their answer, that the bond and mortgage were given as collateral security for certain judgments recovered by different persons against S., which had been assigned to H., and that the said judgments, after the giving of the bond and mortgage, were satisfied by sales, on executions, of other property of S. Proofs were taken by the defendants in support of the defence. H. then proved and exhibited several receipts for moneys paid by him for S., subsequent to the bond and mortgage, on executions on judgments of different

---

Hopper v. Sisco.

---

persons against S., two of which judgments were assigned to H., and a receipt from the holder of a due bill given by S., acknowledging the payment thereof by H., in all amounting to \$301.04. *Held*, that under the pleadings a decree for sale to raise these sums could not be made.

On the 5th of July, 1841, Richard D. Sisco became bound to Andrew P. Hopper in a bond conditioned for the payment of \$1200, in one year, with interest, and on the same day, with his wife, executed and delivered to the said Hopper a mortgage on a tract of land, to secure the payment of the bond. On the 5th of October, 1842, Sisco made his will, by which he devised the said land to his three sons, to be equally divided among them; and on the 5th of November, 1842, Sisco died. On the 25th of November, 1843, Hopper filed a bill in the ordinary form of a foreclosure bill, against the devisees, widow and executors of Sisco, praying that the defendants may be decreed to pay the said \$1200, and the interest thereon, by a short day, and that in default thereof, they may be foreclosed, &c., and the premises be decreed to be sold, and that from the avails of the sale the complainant may be paid the full amount of the said principal sum and the interest thereon.

To this bill the defendants put in an answer, stating that this bond and mortgage were given as collateral security for certain judgments obtained by different persons against Sisco, which had been assigned to the complainant, and which, after the giving of the bond and mortgage, were satisfied by sales, on executions issued thereon, of other property of Sisco. Proofs were taken by the defendants in support of the defence.

The complainant then proved and exhibited five several receipts; one from J. J. Vanderbeck, sheriff of Passaic, dated July 1st, 1841, acknowledging the receipt from Hopper, for Sisco, of \$166.91, in full for debt and costs on a suit of Warner against Sisco; one from James Speer, dated July 12th, 1841, endorsed on a due bill given by Sisco to said Speer, acknowledging the receipt from Hopper of \$18.41, in full of the said due bill; one from R. S. Speer, late sheriff, dated November 3d, 1841, acknowledging the receipt from the complainant of \$20.75, in full of an execution in favor of A. Ryerson, against Sisco; one from Nathaniel Townsend, constable, dated July

---

Hopper v. Sisco.

---

7th, 1841, acknowledging the receipt from the complainant of \$41.28, in full for a judgment of Samuel S. Townsend against Sisco, assigned to the complainant; and one from D. Roe, dated July 7th, 1841, acknowledging the receipt from the complainant of \$53.69, in full of a judgment in favor of C. and D. Warner, against Sisco, which had been assigned to Roe, and which Roe had assigned to the complainant.

The complainant's counsel, on the argument, contended that a decree might be made, under the pleadings, for the sale of the mortgaged premises to pay these sums.

*E. H. Whelpley*, for the complainant.

*D. Barkalow*, for the defendants.

**THE CHANCELLOR.** The complainant cannot be permitted to abandon the case made by his bill, and make another case by his proofs. I do not know that there is any sufficient reason to believe he would have abandoned the case made by the bill, had it not been for the proofs made in defence. Be that as it may, a decree must conform to the case made by the bill.

The merits of the case, which this complainant has attempted to make by his proofs, are not presented to the court by this bill; and to allow a complainant to depart from the ground of relief taken in his bill, and to make another case in his proofs, would be against the good sense of pleading, which requires that every material allegation should be put in issue, that the parties may be apprised of the matters in controversy, and be prepared to meet them by testimony.

A recovery cannot be allowed on a case proved, if it differ essentially from that alleged by the bill. 5 *Munford* 314; 6 *Johns. Rep.* 564; 3 *Rand.* 263; 2 *Bibb* 4, 26.

The bill must be dismissed, with costs, but without prejudice to the right of the complainant to file a new bill, if he thinks he can maintain a suit on a case differently stated.

Bill dismissed.

CITED in *Van Riper v. Claxton*, 1 *Stockt.* 304.



---

Moore v. Degraw.

---

## JAMES MOORE v. JOHN DEGRAW ET AL.

1. A mortgagee in possession personally is chargeable with reasonable rent; and a subsequent mortgagee is entitled to the aid of the court in having such rent ascertained and applied in reduction of the prior mortgage.

2. Decree opened, under the circumstances, after enrollment, and on motion, on application of a subsequent mortgagee, for the purpose of charging the complainant, to whom a prior mortgage had been assigned when he was tenant of the premises under the mortgagor, and who filed a bill to foreclose the prior mortgage, and remained in possession in the meantime, with reasonable rent.

John Degraw had given to ——— Degraw three mortgages on a house and lot, and to ——— Vannuis a fourth and subsequent mortgage thereon. After the giving of all the mortgages, and on the 1st of May, 1843, James Moore rented the premises from the mortgagor, and occupied them for the year, and paid the year's rent, and continued to occupy them, as the tenant of the mortgagor, on an actual or implied letting, for another year. On the 28th of March, 1845, about a month before the end of the second year of his tenancy, the three first of the said four mortgages were assigned to the said James Moore, and he thereupon filed a bill of foreclosure thereon, making Vannuis, the subsequent mortgagee, a party defendant.

The suit progressed, and a decree was made for the sale of the premises, to satisfy the mortgages; James Moore, the complainant, in the meantime, remaining in possession.

Vannuis was absent from the state when a subpoena directed to him was served, by being left at his residence, and did not return until a few days before the beginning of the term at which the decree was taken. The property was sold under the decree for \$1500, and the proceeds of the sale were not sufficient to satisfy all the mortgages; and the money was in the hands of the sheriff.

Vannuis applied, by motion, on notice and affidavits, for the opening of the decree and the master's report, and for leave to put in his bond and mortgage before the master, and for instruction to the master to charge Moore, the complainant, with the rents and profits of the premises from the beginning of the

---

Moore v. Degraw.

---

second year of his tenancy to the time of the sale of the premises under the decree, in reduction of the amount of the mortgages held by Moore.

The motion was resisted, and affidavits read in opposition.

*Blauvelt*, in support of the motion.

*G. Adrain, contra.*

THE CHANCELLOR. One ground on which the motion is resisted, is an alleged agreement between the mortgagor and the complainant, at the time the mortgages prior to that of Vannuis were assigned to the complainant, that if the complainant, (who was then in possession of the property as tenant of the mortgagor,) would purchase those mortgages from the person who then held them, (a son of the mortgagor,) the complainant was to pay no rent for the property, and was to continue in possession of it until it was sold.

These mortgages were assigned to Moore on the 28th of March, 1845. There was then due on them about \$1360; they were assigned for \$1000.

There is something singular in the idea of a mortgagor's agreeing that if a person will buy the mortgage from the mortgagee, he may take possession of the mortgaged premises, and hold them free of rent until they are sold under the mortgage, and that the interest on the mortgage should still continue to run against him. I can see no inducement or consideration for such an agreement. It was argued that the assignor of the mortgages was a son of the mortgagor, and that the sale of the mortgages might have been a benefit to him, and that that benefit might have been the consideration moving the mortgagor. The fact that the property, within about six months thereafter, sold for \$1500, is sufficient to induce the court to pause, before lending its aid to carry out such an agreement, to the prejudice of a subsequent mortgagee. Besides, the evidence is not sufficient to establish such an agreement. It certainly does not show that the mortgagor knew what his son was to get for the mortgages. The case then, must be decided as if no such agreement existed.

---

Moore v. Degraw.

---

A mortgagee in possession by a tenant is accountable for the rents received; and if in possession personally is chargeable with reasonable rent; 4 *Kent* 166; 2 *J. J. Marshall* 465; 16 *Pick.* 46; 5 *Paige* 9. And a subsequent mortgagee is entitled to the aid of the court in having these rents applied to the reduction of a prior mortgage: *Hopkins* 579.

From what time is the complainant to be considered as mortgagee in possession? Before, and at the time he bought the mortgages, he was tenant of the premises under the mortgagor, and about eleven months of the current year of his tenancy had elapsed. Perhaps he should be considered as tenant during that year, and after that as mortgagee in possession; but this is not important, in the view I take of this case. At the end of that year he was indebted to the mortgagor for the year's rent, and could have given credit for it on his mortgages. The mortgagor never demanded it, and must be considered as assenting to having it so applied, if assent were necessary.

It is not supposable that if the mortgagor had demanded it Moore would have paid it, when he held the bonds and mortgages of the mortgagor, which were due, to much more than the amount. I am of opinion, therefore, that the subsequent mortgagee is entitled to have that year's rent, and a reasonable rent thereafter to the time of the sale, credited, in reduction of the amount to be raised in satisfaction of the complainant's mortgages: *Hopkins* 579.

It is objected that the decree being enrolled, the application is too late, in any shape; and that if not too late, it should not have been by motion, but by petition.

It appears by the depositions that shortly after Vannuis' return from Mobile, (whither he had gone before the commencement of the suit,) and a few days before the beginning of the term at which the decree was taken, he called on the complainant's solicitor, who told him he might put in an answer if he pleased; but that Moore's mortgages were prior to his, and that all over Moore's claim would be paid to him. Under these circumstances I cannot deny him relief against the omission of the complainant to make proper credits on his mortgages; and I think the application for relief may be by motion; 3 *John. Ch. R.* 415.



---

Adamson v. Ayres.

---

The decree and the master's report will be opened, and leave given to the defendant Vannuis to put in his bond and mortgage before the master, and the master will be instructed to charge the complainant with the rents, as above stated.

Order accordingly.

CITED in *Wyckoff v. Combs*, 1 *Stew.* 41.

---

SUSAN ADAMSON v. DAVID AYRES, EXECUTOR OF SAMUEL ADAMSON, DECEASED, ET AL.

---

1. A., by his will, provided that his wife should have *her lawful right of dower out of his estate*; that the executor should sell and dispose of all his estate, both real and personal; that his debts be paid; that his brother John have \$500, his brother James, \$100, and that the rest and residue of his estate be divided between his two sons.

2. On bill filed by the widow, stating, among other things, instructions given by A. to the person who drew the will, so to draw it as to give her her lawful third of the personal property, and the use of a third of his lands for life, and demurrer to the bill, it was held that the widow was entitled to her lawful third of the personal estate.

3. It was said by the Chancellor, that the situation of the estate as to the comparative amounts of realty and personalty might be shown, to influence the construction of the will.

---

The bill states that Samuel Adamson died in June, 1840, seized of real estate of the value of \$2000, and possessed of personal property of the value of \$7000, having first made and published his last will and testament, dated March 5th, 1840, as follows: "1st. It is my will that my beloved wife, Susan, have her lawful right of dower out of my estate. 2d. That my executor shall, as soon as, &c., sell and dispose of all my estate, both real and personal, and the proceeds thence arising to be disposed of as follows, viz.—first, it is my will that all my just debts and funeral expenses be duly paid; second, I give and bequeath to my brother, John Adamson, \$500; third, to my brother, James Adamson, \$100, on condition that he shall not bring any account against my estate: if he do, he is to forfeit the above legacy; (fourth and fifth immaterial; sixth, the rest and residue of my estate I give and bequeath to

---

Adamson v. Ayres.

---

my two sons, to be divided equally between them ;” and appointed David Ayres executor of his will and guardian of his two sons, they being minors.

The bill states that the testator, being a farmer, and altogether uninformed as to the correct mode of drawing wills, procured the said David Ayres to draw the said will for him, and that Ayres accordingly undertook, not only to act as the amanuensis of the testator, but also to give such legal counsel and advice as might be suggested by the subject, and to give to the intentions of the testator such form and expression as should be least subject to misapprehension or doubt. And that the testator, on that occasion, and immediately before the drawing of the will by Ayres, asked Ayres what portion of his property, real and personal, his widow would be entitled to by law, if he, the testator, should die without making a will, and that Ayres, in reply, told him that she would be entitled, by law, to one-third of all his personal property, and to the use of a third part of his real estate for her life. That the testator, on receiving this answer, directed Ayres so to write the will that his wife should have such portion of his property, remarking, at the same time, that a third of his personal estate, and the use of a third of his real property, would be sufficient for his wife; and that the testator, in the same conversation, in expressing his intent with respect to a provision for his wife, directed Ayres to write the will, giving her her lawful right of dower out of his estate. That Ayres, though more accustomed to such business than the testator, had but a limited knowledge therein, being uneducated in the law, and was, as well as the testator, under the impression and belief that the phrase, “lawful right of dower out of my estate,” was a form of expression that would convey the meaning of the testator, and would convey the idea that it was the testator’s intention that his widow should receive and be endowed of such portion of his estate, real and personal, as she would have had a lawful right to had he died intestate; and that Ayres, influenced by these impressions, and under the direction of the testator as to his wishes, introduced into the will the said phrase, “lawful right of dower out of my estate.” The bill further states that, after the making of the will, the testator frequently, in conversation with divers persons, and, among

---

Adamson v. Ayres.

---

others, with some of the witnesses to the will, stated that he had given his wife the third of all his property, and had left her in the same situation she would have been in if he had died without making a will; and that he thought that would be sufficient for her.

The bill prays that the defendant, David Ayres, executor, &c., may be decreed to pay the complainant a third of the residue of the personal estate, after paying the debts, funeral and testamentary expenses.

The defendants demurred to the bill.

*J. P. Bradley*, in support of the demurrer, cited *Talbot's Cases* 240; *Fonb. Eq.*, Book 1, ch. 3, § 11, and note O; 3 *Chan. Cases* 133; 2 *Edwards* 139, 146.

*F. T. Frelinghuysen*, contra, cited *Ram. on Wills* 54; 1 *Burrows* 271; 1 *Bro. Ch.* 474; 2 *P. Wms.* 135; 1 *Mason* 10; 4 *Vesey* 437; 2 *Jac. and Walk.* 205; 1 *Ves., Sr.*, 127.

THE CHANCELLOR. The testator declares it to be his will that his beloved wife have her lawful right of dower out of his estate; that his executor sell and dispose of all his estate, both real and personal; that his debts be paid; that his brother John have \$500, and his brother James \$100; and that the rest and residue of his estate be divided between his two sons.

It is contended on the part of the defendants, that under this will, matters stand, in reference to the widow, only in the condition in which they would have stood if the wife had not been at all mentioned in the will; that as in law parlance "dower" relates only to lands, we must substitute the word "lands" for the word "estate," and read the clause in which the wife is mentioned thus: "I will that my wife have her lawful right of dower out of my lands."

If the decedent had made no will, the widow would have had her lawful thirds in both the real and personal estate. Did the testator intend, by making the will, to cut her off from the personal estate? If he did, he had only to omit to mention her



---

Adamson v. Ayres.

---

name in the will, framed as it is in other respects. But he says she shall have her lawful right of dower out of his estate. "Estate" embraces both real and personal property. We are asked to substitute the word "lands" for the word "estate." This would certainly relieve the will from all difficulty of construction, but it would render the whole clause useless; and it would leave no object or motive in the testator for introducing it, but that of putting on the face of the will a clear intention of cutting the wife off from all interest in the personal estate. The will shows no such intention, but a contrary intention; and so it was admitted on the argument. The word "dower," as used in this will, cannot be permitted to control the whole clause for the purpose of excluding the widow, against the intention of the testator, from the right which the law would give her in the personal property. The word "estate" should rather govern or influence the construction of the clause in aid of that intention. The clause being useless, if it be supposed to be confined to lands, we ought rather to suppose it was introduced for a purpose, and that a beneficial one to the widow.

If it be said that the substitution of the word "lands" for the word "estate" would make the clause plain, the substitution of the word "thirds" for the word "dower" would make it quite as plain. If the words had been "dower in my real and personal estate," the word "dower" would not limit the interest to the realty, and the word "estate" includes both real and personal property. What the testator meant by the whole sentence, is the matter to be determined.

I am inclined to think that the word "dower," as it stands in the sentence, is not to be taken as having been used in its technical sense, but is to be taken as having been used as equivalent to "thirds." We are not without cases in which particular words used in a will, opposed to the intention of the testator, have been rejected as having been used by mistake, or through ignorance of their force, or have been construed to have the meaning of other words. 2 *Myl. and Keen* 149; 6 *Sim.* 49; 2 *Dess.* 32; 2 *Munf.* 234; 1 *Ibid.* 549; 1 *Russell and Myl.* 407; 6 *Mad.* 343; 3 *Paige* 9; 2 *Paige* 122; 2 *A. K. Marsh.* 466.

If the different provisions stood in the following order: My

## Adamson v. Ayres.

executor shall sell all my estate, real and personal, and, after paying the debts, pay to my brother John \$500, and to my brother James \$100; and the rest and residue of my estate shall be divided between my two children; my will, however, is, that my wife shall have her lawful right of dower out of my estate—I think the intention of the will could not be mistaken. These are the provisions of the will. The putting them in the above order serves only to show more strikingly, that the clause had an object and purpose to effect, beyond what would have been the effect of the will if the clause had been left out; and that object was to prevent the wife's being cut off from the personal estate. But if the clause is read as the defendant would read it, it is without object or purpose, and would have no influence whatever, and it should therefore be presumed, would not have been added. We have, then, a word in the clause sufficiently broad to carry out what would naturally be, and no doubt was, the intention of the will—the word “estate.”

The description the testator gives of the interest the widow is to have in this estate, is “her lawful right of dower.” I cannot doubt that the word “dower” may stand so connected in a will as to mean the lawful third of the personal as well as of the real estate, and I think it means that in this will.

On the bill as it stands, and in view of the facts which the demurrer must be taken to admit, I am of opinion that the demurrer should be overruled.

It is not necessary now to examine the question whether parol evidence of the declarations of the testator would be admissible. The situation of the estate, as to the comparative amounts of realty and personalty, might certainly be shown. Suppose the estate consisted of \$100 in land and \$10,000 in personalty, the court would not shut its eyes to that fact, and it would have a legitimate influence on the reading of the will. To this extent the cases go without difficulty. 12 *Price* 216; 4 *Russ.* 454.

Demurrer overruled.

CITED in *Leigh v. Savidge's Ex.*, 1 *McCar.* 132.

---

Evans v. Huffman et al.

---

JESSE EVANS, SURVIVING EXECUTOR OF DAVID CAVALIER,  
DECEASED, v. MARY HUFFMAN ET AL.

1. A mortgage will be presumed paid if the mortgagee never entered, and there has been no foreclosure, nor payment of interest within twenty years.

2. *Semble.* Insolvency of the mortgagor is not sufficient to overcome the presumption.

3. Parties are confined to the case made by the pleadings, and evidence to facts not put in issue should not be read or taken.

4. Testimony in disproof of a fact confessed by the pleadings cannot be considered.

5. Would the absence of the mortgagor from the state for a portion of the twenty years, defeat the presumption of payment? It seems not.

---

Bill for the foreclosure of a mortgage, dated March 16th, 1819, given by John Huffman, since deceased, to David Cavalier, since deceased, to secure the payment of a bond of the same date, conditioned for the payment of \$200, in one year from the date thereof, with interest, given by the said John Huffman to the said David Cavalier. The mortgage was acknowledged March 17th, 1819, and recorded the 27th of the same month. The bill was filed October 1st, 1841.

On the 1st of January, 1836, John Huffman died, intestate and insolvent, (the bill states,) and no administration was ever granted of his estate. He left Mary Shorter, Ann Kline, wife of John Kline, and the other defendants, his children and heirs-at-law.

David Cavalier died in June, 1825, leaving a will, of which the complainant and Mary Cavalier, widow of David Cavalier, were executors. The will was duly proved by them. In November, 1840, Mary Cavalier died, leaving the complainant surviving executor.

The bill states that the whole principal sum, with interest from the date of the bond and mortgage, is due and unpaid; that John Huffman possessed the premises till his death, and that from the time of his death, the said Mary Cavalier and the complainant, as executors as aforesaid, or one of them, have been in possession of the premises; and that the rents and



---

EVANS v. HUFFMAN et al.

---

profits have not been more than sufficient to pay the taxes, assessments, and necessary repairs levied and made thereon.

On the 7th of February, 1842, a decree *pro confesso* was made against John Kline, Jacob Huffman, and John Huffman, absent defendants. On the 6th of April, 1842, five of the defendants, viz., Mary Shorter, Ann Kline, wife of John Kline, Robert, Michael and Stacy Huffman, put in their answer, admitting the giving of the bond and mortgage, the acknowledgment and recording thereof, the death of the mortgagor, intestate, and that no administration of his estate had been granted; stating that, as to the death of David Cavalier, and his will, and the death of Mary Cavalier, they know nothing, &c.; admitting that John Huffman, the mortgagor, until his death, enjoyed the premises, by tenants living thereon under him, he not living thereon himself; but denying that Mary Cavalier and the complainant, as executors as aforesaid, or either of them, have been in possession of the premises since the death of the mortgagor; and submitting that the said executors could not have been in possession without a recovery of such possession by some proceeding at law or in equity, or the assent of the mortgagor or his heirs; and denying that such recovery was ever had, or such assent given. And they say that, even if the said executors did enter on the premises, they did so as trespassers; and they charge that, since the death of the mortgagor, his children and heirs-at-law have possessed and enjoyed the premises. They submit that, on the case made by the complainant's bill, he is not entitled to the relief he seeks, his testator and he having slept over their rights for more than twenty years; and that the bond and mortgage have thereby become inoperative and void.\*

They insist that the mortgage, having been given merely to secure the bond, ceased to have any legal effect as soon as the bond was satisfied, or by lapse of time, or other cause, could not be a lawful ground for the recovery of the money therein mentioned. That, after the lapse of sixteen years, the bond was, in law, presumed to be satisfied; and that the mortgage, given merely to secure the same, became, thereby, and consequently, inoperative, and of no effect. That, more than twenty years having elapsed between the date of the mortgage and the filing

---

Evans v. Huffman et al.

---

of the bill, and the said mortgagor, his widow and heirs, having possessed the premises during all that period, without claim on the part of the complainant or his testator, the complainant is barred, &c.; and they pray that they may have the same benefit of these matters as if they were formally in pleading alleged.

They say, as sustaining the presumption of law, that they are informed, and believe and charge that, about the summer of 1820, it was agreed between the said John Huffman and the said David Cavalier, that the said David should receive, for coal charred on the premises, \$50, to be applied towards payment of the bond; and that he received the said sum, and gave a receipt, stating that he had received it on the said bond; and that the said David, about the same time, bought of said Huffman a large quantity of pine timber then lying in logs, at \$5 per 1000 feet, amounting to 30,000 feet; and that it was agreed between them, that the amount thereof should go towards the liquidation of the said bond; and that the said David took and carried away the said timber, and thereupon gave to the said Huffman another receipt for \$150, as so much further paid on said bond; and that the said David, in the year 1831, rented twenty acres of land of said Huffman, at the yearly rent of \$14 an acre, and that it was agreed between them that the rent should go to the payment of said bond, and towards payment of other demands which the said David had against the said Huffman after satisfying the said bond; and that, thereupon, some time in the year last aforesaid, the said David gave a receipt stating that he had received \$80 from the said Huffman, in payment of what remained due on the said bond, and that the residue, after paying off the said bond, was to go towards payment of the book account he had against the said Huffman; and that the whole amount due on the said bond was paid.

That, prior to the giving of the bond and mortgage, Huffman was intemperate, and after that time gave himself up, in a great measure, to habits of intemperance; that the said receipts were seen in his possession about 1825; but that, after that time, he was, from his habits, entirely separated from his family, and was, at that time, and afterwards, from that cause, incapable of

---

Evans v. Huffman et al.

---

retaining any article or paper of value in his possession; and that the said John having, from that time to the time of his death, lived away from his family, and having died separated from them, the defendants are unable to produce the said receipts, and believe them to be lost, or to have fallen into unknown hands.

That they are informed and believe and charge that the said David repeatedly, in his lifetime, stated that the said bond was paid off, and expressed his wish and anxiety to give up the said bond to the said Huffman, but that the said Huffman, after the said bond was paid off, was not living in the neighborhood of said David.

That in the summer of 1824, more particularly, the said David stated that the said bond was paid off, and all his other accounts against the said Huffman; and that the said David, on his death-bed, about four days before he died, expressed great anxiety to see the said Huffman, and give him up the said writings, and requested that the said Huffman might be brought to him, saying he was afraid that, after his death, they would fall into other hands, and be wrongfully set up against the said Huffman, but that the said Huffman not living near, the said David died without seeing him.

That shortly afterwards, the said Huffman, hearing of the death of the said David, and taking with him Samuel Leeds and Asa Moore for witnesses, went to the late residence of the said David, and demanded the said bond and mortgage of his widow and executrix, saying they were paid off; and that the said executrix said she could not find them, but that they were paid, and that she would see if they were in the possession of the other executor—the complainant—and that she gave her word of honor and promise to the said Huffman, that the said bond and mortgage should be destroyed, and that the said executrix repeatedly afterwards stated that the said bond was paid off. And the defendants say they are ignorant, and have no knowledge or information of the other matters alleged or charged in the complainant's bill, and not answered unto.

Testimony was taken on both sides, and the cause was heard on the pleadings and proofs.



---

EVANS v. HUFFMAN et al.

---

*J. C. Ten Eyck*, for the complainant, cited *Saxton* 685, 694; 5 *John. Ch. R.* 553.

*H. W. Green*, for the defendants, cited 1 *John. Ch. R.* 46; *Ambler* 645; 3 *Bro. Ch.* 291, 639, note; 2 *Story's Eq.*, § 1520, and note 2; 2 *Ves., Jr.*, 11; 1 *Phil. Ev.* 119; 4 *Burrow's Rep.* 1962; 10 *John. R.* 387, 417; 16 *John. R.* 214; *Penn. R.* 702; 2 *Halst. Rep.* 113; 3 *Green's Rep.* 296.

THE CHANCELLOR. This is a suit for the foreclosure of a mortgage given March 16th, 1819, to secure the payment of a bond of that date, in one year, with interest. The bill was filed October 1st, 1841, twenty-one and a half years after the bond became due, by the surviving executor of the mortgagee. The mortgagee died in 1825, leaving a will. The mortgagor died in 1836, intestate, and no administration was taken of his estate. The executrix, Mary Cavalier, widow of the mortgagee, died in November, 1840.

The bill states that the mortgagor remained in possession of the premises until his death, and this is admitted by the answer. It states that, from the time of the mortgagor's death, the executors of the mortgagee, or one of them, have been in possession of the premises. This is denied by the answer.

Two grounds of defence are taken—first, the lapse of time, and the presumption of payment arising therefrom; second, actual payment.

Samuel Leeds, called for the defendants, testifies to the payment, and the mode in which it was made, and that, after Cavalier's death, Huffman, the mortgagor, called on Mrs. Cavalier, the executrix, and demanded the writings, and that she told him she did not know where they were, but promised, when she found them, to destroy them. Leeds' testimony has been attacked by the production of several witnesses, who testify that Leeds told them the mortgage had never been paid.

On the testimony in reference to actual payment, as it stands, subject to the evidence given in impeachment of Leeds' testimony, the cause cannot be decided very satisfactorily. It may be said, however, that the depositions on this part of the case

---

Evans v. Huffman et al.

---

turnish proof of the wisdom of the statute of limitations. And on this part of the case, and in connection with what Leeds swears Mrs. Cavalier told Huffman, after Cavalier's death, viz., that she would destroy the papers when she found them, and with the fact that the widow and executrix lived more than twenty years after the bond became due, and that no suit was brought till after her death, it may be very properly asked why should the executors delay so long? Was Mrs. Cavalier unwilling to bring suit; and if so, why? If not, why did not the executors close the estate long before? Cavalier died in 1825, sixteen years before the suit was brought. Have they settled their accounts? Are they charged with this bond and mortgage? We have no information.

And in this connection it may be further remarked that Cavalier's will says nothing of the bond and mortgage, or of the land covered by the mortgage. From the frame of the will, this, I think, is worthy of observation. He directs so much of his movable property as will pay his debts, to be sold, and the use of the surplus thereof he gives to his wife, for her life. He then makes seven devises of land, by description, gives three small pecuniary legacies, and then provides that if there should be any cash left, he gives it to, &c., and there is no other residuary clause.

It would be painful to decree a foreclosure after such a lapse of time, if from the testimony and the circumstances of the case, there be a probability of actual payment. It would be less painful to me, and more salutary, if the executors should suffer loss for their default. But whatever might be the conclusion of the court, if this were the only ground of defence, it is clear that if Leeds' testimony can be relied on to prove any payment, it proves payment in full. If it ought to be considered as not entitled to credit on the question of payment, it must be rejected altogether as to that. This, (without referring, at present, to some matters to be hereafter considered,) would leave us simply the case of a bill to foreclose a mortgage after twenty-one and a half years, on which no interest has been paid.

I am of opinion that, under such circumstances, the mortgage should be presumed paid. I think the spirit of our statute of limitations requires us to make the presumption. I concur

---

Evans v. Huffman et al.

---

in the views of the Chancellor on this subject, expressed in *Wanmaker v. Van Buskirk, Saxton* 693.

It is true the Chancellor there says he was not called on to establish the principle in that case, but it is evident from his reasoning, that if he could not otherwise have decided the case for the mortgagor, he would have given effect to the presumption. Indeed, he says, standing alone it would be tantamount to actual proof of payment.

The English cases and the cases in New York are reviewed in 5 *John. Ch. R.* 545, and the court there came to the conclusion that a mortgage is not a subsisting title, if the mortgagee never entered, and there has been no foreclosure, nor payment of interest within twenty years; that these facts authorize and require the presumption of payment, and that such presumption is founded in substantial justice and the clearest policy.

The force of the remark of Sir William Grant, in 12 *Vesey* 252, is shown in this case: "The presumption does not rest on the belief that the payment has actually been made, but is raised because the means of creating belief or disbelief, after such a lapse of time, are so little to be relied on."

In this state, we have a statute providing that every action on any bond, &c., conditioned for the payment of money only, shall be sued within sixteen years after the cause of action accrues, and not after, unless a payment has been made within or after that period, and then within sixteen years after such payment, and not after. Whether or not it be an anomaly, as suggested by the counsel for the defendants, to hold, as seems to have been held, that twenty years shall be allowed for the foreclosure of a mortgage given to secure such bond, that is, four years after the bond thus secured ceases to be a cause of action, I do not now inquire; but the statute very fully apprises the courts that no scruples need be felt in raising the presumption of payment after twenty years.

But it was argued that this presumption may be overcome, and that the insolvency of the mortgagor is sufficient to overcome it; and the case of *Wanmaker v. Van Buskirk* was referred to for this position. The Chancellor, in that case, said that the presumption might be overcome, and that there were



circumstances in that case of sufficient weight to destroy it. The mortgagor had married the daughter of the mortgagee, and had issue, and had died many years before, leaving his wife and children in possession; and they were not in a situation to pay either principal or interest; and to have exacted payment must have brought distress upon them. These were the circumstances which the Chancellor said were sufficient, in his mind, to repel the presumption. He said that insolvency had been held sufficient, but he does not so decide; nor was there any room for such a decision in that case.

I do not see that insolvency of a mortgagor is any good reason why a mortgage should not be foreclosed; or any good reason why the mortgagee should permit the mortgagor to occupy the premises twenty years without paying any interest. But if I could think it was, the fact is not sufficiently shown in this case. When was he insolvent? A warrant of attorney to enter judgment was annexed to the bond; and the money became due in 1820. Was not the property sufficient for the money? We hear of no other debt till three years thereafter, and that for only \$300. How much was the property worth?

But it is contended that the mortgagee took possession of the premises within the limited time. If this be so, and can be made to appear in the cause, the presumption does not arise. Leeds was in possession before and at the time of the mortgagor's death; and the complainant claims that he went into possession under the mortgagee. Can this be shown, under the pleadings in the cause? The bill charges that the mortgagor remained in possession till his death in 1836; and the answer admits it. This, then, is a fact not in issue between the parties. Parties are confined to the case made by the pleadings, and cannot examine witnesses or read evidence to facts not put in issue. It would be dangerous to allow a complainant, after answer filed, to change his ground in his proofs. But if the evidence were admissible, it does not prove the fact. Leeds swears he went into possession under the mortgagor, and has remained in possession ever since. The evidence offered that Leeds, at times, said he was in under Cavalier, if it is to be relied on to prove that he really said so, can have no other effect than to

---

Evans v. Huffman et al.

---

weaken our belief of the fact he swears to. It is not substantive evidence ; it is no evidence of a fact ; no evidence that he went in under Cavalier ; and he swears he did not. But the evidence is inadmissible ; a fact confessed by the pleadings cannot be disproved.

The bill charges that after the mortgagor's death, in 1836, the executors, or one of them, took possession. This is denied by the answer, and there is no proof of it. Leeds was in long before, and has continued in possession ; and there is no evidence of his holding differently after the mortgagor's death ; or of his agreeing to hold after that under the executors or devisees of the mortgagor.

We have a statute, passed February 21st, 1820, which provides that if any person against whom there shall be (among other causes of action) a cause of action on a bond for the payment of money only, shall not reside in the state when such cause of action shall accrue, or shall remove from the state after it accrues, before the time of limitation (by the statute) shall expire, then the time during which such person shall not reside in the state shall not be computed as part of the period limited for bringing the action ; and this act, it has been adjudged by our Supreme Court, (2 *Harr.* 82,) applies to obligations made before its passage.

The idea of removing the objection growing out of the lapse of twenty years, by proof of the mortgagor's absence, does not seem to have occurred in preparing the cause for hearing. If it had, the proof of his removal from the state, and the time of his absence, between 1820 and 1836, (time after his death could not be counted) would have been more definite, if absence, on such removal, and for a sufficient length of time, could have been shown. But if the proofs were sufficiently definite to raise the point distinctly, the act is not, in terms, applicable to a mortgage ; nor is a mortgage, as it seems to me, within the spirit of the act. If our Court of Chancery had adopted the principle that a lapse of sixteen years should bar the foreclosure of a mortgage given to secure a bond, in analogy to the statute limitation of actions on bonds, it might, with some force, be argued that the period of absence or removal from the state should be deducted, in analogy to the act of 1820.

---

Hazen's Adm'rs v. Tillman's Heirs.

---

But the argument would not be conclusive, for the land cannot remove.

Again : No opinion has been intimated in this court, that any period short of twenty years would bar a mortgage. The court has not acted on mortgages in reference to the statute limitation of actions on bonds.

On the whole, I am of opinion that the bill must be dismissed.

Decree accordingly.

---

THE ADMINISTRATORS OF AARON HAZEN v. THE HEIRS AND  
DEVISEES OF JOHN TILLMAN.

A decree against executors, in a suit against them, is no evidence in a subsequent suit against the devisees, of the existence of the debt.

---

In January, 1839, the administrators of the personal estate of Aaron Hazen, deceased, on a bill theretofore filed by them against the executors of the will of John Tillman, deceased, obtained a decree against the said executors for the payment by them, out of assets *quando acciderint*, of \$469.78.

In 1841 the said administrators of Hazen's estate filed a bill against the heirs and devisees of the said John Tillman, setting forth the said bill against the executors of his will, and the decree thereon ; and stating that the personal estate of the said John Tillman, deceased, has been exhausted and fully administered by the said executors ; that there is no personal estate of the said John Tillman, deceased, to the knowledge of the complainants, from which assets *in futuro* might come to the hands of the said executors to be administered ; and that lands of the said John Tillman, deceased, came to the hands of the defendants by devise, which were sold by them ; and praying that they might be decreed to pay the amount of the said decree against the said executors.

The bill was demurred to.



---

Hazen's Adm'rs v. Tillman's Heirs.

---

*P. D. Vroom*, in support of the demurrer, cited 1 *Munf.* 455 ; *Greenl. Evid.*, §§ 535, 536 ; *Phil. Evid.* 226.

*E. H. Whelpley* and *H. W. Green*, *contra*, cited *Elm. Dig.* 170, 171 ; 4 *Johns. Ch. R.* 620 ; 1 *Smith's Ch. Prac.* 526 ; *Mif. Plead.* 59 ; *Greenl. Evid.* 591 ; *Saxton* 512.

**THE CHANCELLOR.** The question is whether a decree against executors, in a suit against them, is sufficient evidence in a subsequent suit against the heirs and devisees of the existence of the debt.

A decree of this court is equivalent to a judgment at law. But one who is not made a party, and between whom and the party there is no privity, is not bound by the decree. There is no privity between the executor and the heir or devisee. 1 *Paige* 35 ; 1 *Munf.* 437 ; 4 *Harr. and John.* 126, 270.

In the case in *Munford*, the bill was against the executors and devisees ; no proof of the claim was offered, except a judgment against the executors. The court held it was no proof against the devisees.

The debt of the ancestor, or deviser, should be established in a suit in which the heirs, or devisees, are parties, and in which they can contest it.

The effect of the demurrer is not to admit the debt, but to submit to the court the question whether, on the fact stated in the bill, that a decree was obtained in a suit against the executors, a decree can be made against the devisees in this suit.

The demurrer is allowed, with leave to the complainants to amend their bill.

Order accordingly.

●

## JOHN KEAN v. ROSWELL L. COLT, THE SOCIETY FOR ESTABLISHING USEFUL MANUFACTURES, ET AL.

1. On motion on bill and notice for an injunction and the appointment of a receiver, the affidavit of the defendant may be read in opposition.
2. To authorize an injunction and the appointment of a receiver, there must be a well-grounded apprehension of injury about to be done.
3. Where the misconduct alleged in the bill occurred, if at all, several years before, and no act is threatened, or mischief impending, an injunction and receiver will not be ordered.

---

The bill in this case, filed November, 1845, by John Kean, representing himself to be a stockholder in the Society for Establishing Useful Manufactures, for himself and all other stockholders of the said society who shall come in and seek relief by and contribute to the expense of the suit, states that the society was incorporated on the 22d November, 1791; that it was the intention of the legislature that the society should themselves carry on manufactures, and that the society so understood the law, and under that understanding bought the old mill seat at Paterson, and upwards of 700 acres of land, with the water incident thereto, both above and below the falls at that place. That in 1793 the society established a cotton factory at Paterson, on said lands, and in 1794 a printing, bleaching and dye shop, but very soon thereafter entirely discontinued manufacturing, and has not since resumed it, nor has any part of their capital been since employed in manufacturing purposes.

That for many years the affairs of the society were entirely neglected, and so managed by the directors thereof, that the stockholders, entirely ignorant of its condition, placed little value on the stock of the society, or its property; and that about 1814 Roswell L. Colt bought up at a depreciated price a large proportion of the shares, and called the society together, and proposed to its members a plan for improving its affairs, which was to abandon all hope of manufacturing, and to confine its operations to increasing the water-power which it was supposed to own, and the number of sites for manufacturing purposes, to

---

Kean v. Colt et al.

---

be used by others, and to lease to others the sites with water privileges for manufacturing purposes, which plan was adopted, and has ever since been pursued, under the sole direction of Roswell L. Colt, who was then made governor of the society, and has continued such governor ever since.

That by the adoption and pursuit of the said plan, a very large annual income has ever since been derived from the property of the society. That on the 22d February, 1814, the legislature passed an act entitled "An act to preserve the interest of this state now vested in the stock of the Society for Establishing Useful Manufactures," the preamble of which recites that the state had invested in the stock of the society \$10,000, being the amount of 100 shares; that the original design and intention of the institution had failed, and been for a long time abandoned; that no dividends had ever been made, nor any satisfactory account rendered by the directors to the commissioner of the state, of the transactions of the society, or the situation of its property or funds; and that the society had lately sold and conveyed portions of its real estate, and had neither made, nor offered, any dividend of the proceeds of the sale, and which act appoints E. Vanarsdale, esquire, a commissioner, under the 15th section of the charter of the society.

That under this act Mr. Vanarsdale made a report to the legislature, which was referred to a committee of the legislature, who, on the 19th of January, 1816, reported that the personal and leased property of the society, (according to its statements exhibited by its agents to Mr. Vanarsdale,) as existing on the 2d October, 1815, amounted to \$119,317.34. (The items constituting that sum are given by the committee, and stated in the bill.) That the committee further reported that there remained unsold, belonging to the society, 606<sup>30</sup>/<sub>100</sub> acres; and that the number of shares then consisted of 2266. That the committee recommended that the legislature accept, from the society, a conveyance to the state of so much land as would be equal in value to the state's shares of stock, which they estimated to be worth, in land, \$11,000, and transfer to the society, or to such person as the society might appoint to receive the same, the state's shares in the stock of the society. That on this report the state, by act of the legislature, authorized the acceptance



of a conveyance of so much land as a majority of three persons, named in the act, should judge to be of the value of \$11,000, and the transfer of its stock to the society, or to such person, &c. That on the 19th of October, 1816, the persons named in said act reported to the legislature that they had accepted a deed from the society to the state, for three hundred and one and fifty-three hundredths acres, and had transferred the state's stock to Roswell L. Colt, agreeably to the directions of the society, and presented to the legislature the direction of the society, under their seal, to transfer the state's shares to the said Colt. That this report was confirmed by the legislature October 25th, 1816.

The bill charges that these shares, being conveyed to the said Colt in consideration of lands of the society conveyed to the state, must be considered as belonging to the society, and the said Colt be considered as holding the said shares only as trustee for the society.

The bill charges that the said Colt has converted the said stock, and the dividends thereof, to his own use. That by the tenth and eleventh sections of the charter, it is provided that there shall be thirteen directors, and that in elections for directors, each share shall have one vote, and that five of the directors—the governor or deputy governor of the society being one—shall constitute a board for business.

That the said Colt, by buying up a majority of the stock, obtained the entire control of the society, and that, after having done so, and examined the condition of the society, he found that its stock was of much greater value than the public or stockholders supposed; and, for the purpose of inducing the stockholders to sell their stock, represented that the society had lost a great deal of money by embarking in the business for which they had been incorporated, and had abandoned their business, and had lost a large amount in their lottery concern, and that the stock was valueless, though, at the same time, it was worth par, and that the said Colt, by such false representations, succeeded in purchasing a very large majority of the stock. That, being the owner of such majority, he has, for more than thirty years, caused himself, and such others as he chose and could control, to be elected directors—in most instances irresponsible persons and persons who would obey his direc-

---

Kean v. Colt et al.

---

tions—and elect such persons as he should name governor and deputy governor; and that the said Colt has, for all that period, been and still is such governor; and that, at times, one Joseph Smith, a clerk of the said Colt, has been deputy governor; and that the complainant is informed and believes that the other directors are mere instruments and agents of the said Colt, having no actual interest in the society, and who, if they hold any stock, are mere trustees for the said Colt.

That, by the charter, the cashier or treasurer of the society is required to give security in \$20,000. That Joseph Smith is now such cashier or treasurer, and that he has never been required to give security. That the charter requires that there shall be a yearly dividend for the first five years, and thereafter a half-yearly dividend, of so much of the profits of the society as to the directors should seem expedient. That, for a large number of years last past, the profits of the society have been very large. That the charter authorized lotteries to raise, for the benefit of the society, \$100,000. That large sums of money have been received by the said Colt, under some arrangement with D. S. Gregory and others, in reference to the lottery privilege granted by the charter, and have been appropriated by him to his own use, except a few thousand dollars, which, the complainant is informed and believes, has been paid to certain agents, to obtain influence with the legislature to prevent their putting a stop to the lotteries.

That the rents, profits, and resources of the society have come to the hands of the said Colt, and have been expended by him in objects wholly distinct from the interests of the society—to the building of a house and fixtures, costing over \$100,000, for the residence, as he states, of the governor of the society, and which are now in his possession, and the care and improvement of which is a subject of charge, by the said Colt, on the profits of the society; and that he furnished the said house extravagantly, with the money of the society—all which the complainant charges to be fraudulent and in violation of his rights.

That the said Colt has expended, on a small farm owned by the society, in the vicinity of Paterson, \$30,000 of the funds of the society, in costly improvements, and in purchasing cattle and other stock, the whole of which, with the farm, would not

---

Kean v. Colt et al.

---

now sell for more than \$30,000. That Colt pretends that all this was done in pursuance of resolutions of the board of directors; whereas the complainant charges that if there are any such resolutions, they were procured to be passed by Colt, he having the control of a majority of the stock, and by the votes of directors put in by him, and who held their offices at his will.

The bill charges that the said Colt, being indebted to the executors of Robert Oliver, deceased, in a large sum, did, on the 14th of November, 1839, agree to give them a bond and mortgage of the society for \$100,000, and also sundry leases of the society, amounting to \$14,995, in part payment of his said individual debt; and further, that the said executors should have the control of the board of directors of the society. That the said Colt, for the purpose of enabling himself to pay his individual debts, procured or induced the board of directors of the society to give him a mortgage on the property of the society for \$100,000, and to execute to him five bonds of the society, amounting to \$80,000; and to give him another mortgage on a house and 40 acres of land in the society, to secure the last-mentioned bonds; and that on the 1st of February, 1840, he induced the board to convey to him a large number of leases and building lots of the society, amounting to \$200,000; all which several bonds and mortgages, leases, building lots and property were, very soon after, conveyed by the said Colt, in payment of his individual debts, to the said executors of Robert Oliver and Margaret Colt and Emily Gibbs.

That at the time the said bonds and mortgages, conveyances and transfer of leases were made, the board consisted of the said Roswell L. Colt, and a brother and two sons of the said Colt, and William L. Clark, Elisha B. Clark, and Daniel Ridgway. That on the 14th of November, 1839, the said Roswell L. Colt, to carry out his arrangement to give the control of the board to the executors of Robert Oliver, caused and procured four of the then directors, viz., William L. Clark, Daniel Ridgway, Robert O. Colt and James C. Colt, to resign, and the said Charles Oliver and Thomas Oliver and John Glenn and Thomas S. Gibbs to be elected in their places.

That by the 3d section of the charter it is enacted that the society shall not deal or trade except in such articles as itself



---

Kean v. Colt et al.

---

shall manufacture, and the materials thereof, and as shall be really and truly received in payment and exchange therefor. That the said bonds, mortgages, conveyances, and transfers of leases to the said Roswell L. Colt were not made by a quorum of disinterested directors ; and that the said directors had no authority under the charter to make the same, and that the same are fraudulent and void as against the stockholders, and a breach of trust in the directors who made them, and in the said Roswell L. Colt, who received them.

That the complainant has been informed and believes that the said Roswell L. Colt afterwards, either himself or through an agent, bought back the said real estates, leases and other property, at a depreciated value, and paid for the same with the money or property of the society, and now holds the same for his own benefit. That the said Roswell L. Colt has bought a large number of shares of the stock of the society, with the funds of the society, and has by that means obtained the entire control of the society ; and as there is no provision in the charter requiring a director to be a stockholder, he elects persons for directors who own no stock, but who are his agents, instruments, and dependents.

That by way of consideration for said bonds and mortgages, &c., made by the directors to him, the said Roswell L. Colt presented claims against the society to the amount of \$305,000, wholly unfounded and unjust ; and, if any settlement was made between him and the directors, it was erroneous, fraudulent and void, and a mere contrivance of the said Roswell L. Colt, to obtain a conveyance or transfer of the property to him.

That on the 17th March, 1840, the said John O. Colt was the acting deputy governor of the society ; and on that day the society purported to convey, under the seal of the society and the signature of the said John, as deputy governor, to said Roswell L. Colt, for the consideration of \$50,000, a large number of building lots in Paterson belonging to the society, and in the deed conveying the same there were full covenants of warranty ; and that on the same day, there was also conveyed by deed, in the same manner, to said Roswell L. Colt, for the consideration of \$150,000, twenty-two feet of water in the Passaic ; and on the same day, the said Roswell L. Colt and his wife conveyed

---

Kean v. Colt et al.

---

the whole of said building lots and water to the exécutors of Robert Oliver, in payment of a debt due from the said Roswell L. Colt, individually, to the said Robert Oliver in his lifetime.

The bill charges that nothing has ever been paid by the said Roswell L. Colt to the society, towards the consideration mentioned in said conveyances ; and that said executors took the said conveyance from Roswell L. Colt and wife to them with knowledge that nothing had been so paid ; that said Roswell L. Colt had no authority to cause the same to be so conveyed to them as aforesaid, and that he had no title thereto, or right to pass the same to them. That the said conveyances were not made by a regular order of the board ; that a quorum of the board did not vote for the same ; that the said Roswell L. Colt himself was one of the number by whose votes the resolutions were passed ; and that the others whose votes passed the same, were merely nominal directors, acting under the dictation and control of the said Roswell L. Colt, and voting on his stock.

That the property of the society, notwithstanding the extravagant expenditures of the said Roswell L. Colt, increased between 1814 and 1845, from \$108,268 to \$———, and that the dividend to which the stockholders were entitled was —— per cent. ; but that the said Roswell L. Colt prevented the directors from declaring any larger dividend than five per cent. on the said 2266 shares, in order, as the complainant believes, to enable the said Colt to buy up the stock at a depreciated value. That, in order nominally to comply with their charter, dividends have been declared, from time to time, of about five per cent. on the amount of the capital stock of the society.

The bill charges that Colt is unable to account for the waste and misapplication by him of the property of the society ; and the complainant says he is apprehensive that if the property of the society is suffered to remain under the control of Colt and such directors as he may appoint, there will be serious loss to the complainant and the other stockholders. That the facts before stated show such an entire control by Colt over the board, and such entire subserviency of the board to his will, as renders the property of the society very unsafe in the hands of such depositaries.

---

Kean v. Colt et al.

---

The bill charges that Colt caused to be invested in United States Bank stock a large sum of the moneys of the society, and, by means of the sale of the said stock, or by buying the notes of the said bank with the funds of the society, much below their par value, and passing them to the bank at their par value, in payment of his own debt, made over \$100,000.

The bill prays that said Roswell L. Colt may set forth the particulars of the personal estate of the society which have come to his possession or use ; and whether any moneys of the society have been placed at interest, and in whose name, and what sums have been received for interest, and by whom ; and that he may set forth whether he hath not applied all, or some, and what part of the real or personal estate of the society to or for his own use ; and that he may be removed from the office of director and governor of the society, and be decreed to replace all such parts of the personal property of the society as may have been sold by him ; and that he may account for all the revenues, rents, and profits of the estate of the society which have come to his hands or use ; and for all the moneys received by him for or on account of any sale or assignment of the right to draw lotteries, or of the lottery privileges granted by the charter ; and for all premiums he may have received at exhibitions of articles of the growth or manufacture of the society, or the product of its property, or of labor paid for by the money of the society ; and for all breaches of trust and misapplication of the funds of the society ; and for all moneys made by him by the purchase and sale by him of any of the property of the society with the funds of the society ; and that the said deeds, conveyances, and mortgages to the said Roswell L. Colt may be declared void ; and that the deeds, conveyances, and mortgages of the property of the society made by the said Colt to the executors of Robert Oliver, deceased, and Margaret Colt and Emily Gibbs may be declared void ; and that an inventory may be taken of all the property of the society ; and that the said mansion, appurtenances, furniture, &c., and the said farm and stock may be sold, and in case the proceeds of the sale be insufficient to pay the costs thereof, and of maintaining the same, that the said Colt may be decreed to account for the deficiency ;



---

Kean v. Colt et al.

---

and that a receiver may be appointed of all the rents, issues and profits of the property of the society, real and personal, and to take possession of the said mansion-house and the lands attached thereto, and of the said farm and the stock thereon, and of all the lands, property and estate of the society conveyed by said Colt, or by him and his wife, to the executors of Robert Oliver and Margaret Colt and Emily Gibbs, and to receive the rent from the lessees of land or water of the society, on the leases which have been assigned by the said Colt, or by his procurement or consent, to the executors of Robert Oliver, or to Margaret Colt and Emily Gibbs, or any of them; and that the affairs of the society be wound up, and its property be sold, and the proceeds thereof, after the payment of its debts, be divided among the stockholders; and that the said Colt may be restrained from expending any of the money of the society in, &c.; and from selling, assigning, conveying or mortgaging any of the real estate of the society; and from assigning or transferring any of the leases of water, or water rights of the society; and from using the funds, credit or name of the society, for any purpose whatever; and that the society be restrained from paying money to the said Roswell L. Colt, or to his agents, in the shape of salary or otherwise; and from parting with any of the funds or property of the society, except by order of this court.

Subpœna is prayed against Roswell L. Colt, John O. Colt, Charles Oliver, Thomas Oliver, Robert M. Gibbs, Emily Gibbs, and the Society for Establishing Useful Manufactures.

On the filing of this bill, the complainant gave notice of a motion, founded on the charges of the bill, for an injunction, and the appointment of a receiver, pursuant to the prayer of the bill.

On the hearing of the motion, and after the reading of the bill, two affidavits of Roswell L. Colt, and an affidavit of Joseph Smith, an agent of the society, were offered in opposition to the motion, and were objected to.

*B. Williamson* and *W. Halsted*, in support of the objection, cited *Story's Eq. Pl.*, §§ 583, 606; *Risley's Eq. Evid.* 242; *Saxton* 458; 1 *Green's Ch. R.* 191; 1 *Johns. Ch. R.* 444,

---

Kean v. Colt et al.

---

445; 1 *Smith's Ch. Pr.* 595, 597; 3 *Anstruther* 658; 6 *Cranch* 51; 2 *Paige* 413.

*P. D. Vroom* and *E. Vanarsdale, Sr.*, *contra*, cited 9 *Paige* 504; 19 *Vesey* 350, 447; 1 *Hopk.* 599; 4 *Cond. Eng. Ch.* 447; 2 *Merivale* 29; *Cooper's Eq. R.* 303; *Drury on Inj.* 246, 374, 137, 192; 1 *Grant's Ch. Pr.* 332; *Eden on Inj.* 327, 328.

THE CHANCELLOR. It is every day's practice to hear an answer read as an affidavit, against a motion for an injunction. I cannot doubt that the court may hear the defendant by affidavit. The complainant gives notice of a motion for an injunction on his bill, and says the case is pressing, and that he cannot wait for an answer. The defendant, then, should be heard in a shorter way than by answer. Let the affidavits be read.

The first affidavit of Roswell L. Colt states that he has been governor of the society since 1824. That he has searched the books and papers of the society, and finds no stock standing in the complainant's name. That on the 31st of May, 1827, ten shares stood in the name of Peter V. B. Livingston, and that on that day they were transferred by Peter Kean, trustee and attorney of Peter V. B. Livingston, one share to Philip Ricketts, and nine shares to said Peter Kean; that these nine shares still stand in the name of Peter Kean; that he died intestate, in 1828, and that administration of his personal estate was committed to Sarah S. Kean, his widow, who afterwards married Looe Baker, who, and the said Sarah, now live in the city of New York. That no transfer of said shares, or any of them, has been made by them, or either of them, on the books or papers of the society; and that no notice of any such transfer has ever been given to the society, to the deponent's knowledge or belief. That neither the said Peter Kean, in his lifetime, nor the said administratrix, nor the said Looe Baker, nor the complainant, ever called for any dividends on the said shares, or requested any examination of the affairs of the society, or made any complaint of the acts, proceedings or management of the society; nor has the complainant remonstrated to the said socie-

---

Kean v. Colt et al.

---

ty against any of its acts or doings. That the deponent has heard, for many years, that there are disputes about the right to the said shares, and that divers persons have claimed an interest therein, and that he has always believed and now believes, that the only reason why the dividends on the said shares have not been called for, was the dispute about the right thereto. That no notice has ever been given to the society that the rights to the same have been adjusted. That the principal business of Paterson depends on the certain and regular supply of water to the mills; and that this water is under the entire charge of the society and its agents; and that the society is now engaged in making important alterations, and employing a good many hands. That there are important lawsuits now pending between the society and its tenants or grantees: and one, vital to the interests of the society, with the Morris Canal and Banking Company; and that he believes that the complainant's bill has been contrived by persons employed as counsel for, or interested in the stock of said Morris Canal and Banking Company, to prevent the prosecution of said suit with effect. That the whole stock of the society is 2269 shares; and that he owns, either in his own name or in trust for him, 2019 $\frac{2}{3}$  shares, and that his son, Morgan G. Colt, owns 100 shares, and his son, Thomas O. Colt, 100 shares. That Peter V. B. Livingston died in 1792, leaving a large number of children, and that if he, in his lifetime, had given to Peter Kean a power of attorney, it must have ceased to operate at his death; and that the deponent has no recollection of ever having seen any such power of attorney.

The deposition of Joseph Smith states that he is, and has been for some years, agent of the society, and that he has charge of the books. That there is no stock standing in the name of John Kean on the books of the society. That 10 shares, and no more, stood in the name of P. V. B. Livingston. That on the 31st May, 1827, P. Kean, as trustee and attorney for P. V. B. Livingston, transferred one share to P. Ricketts, and nine shares to P. Kean, and that these nine shares now stand on the books in the name of P. Kean. That the whole number of shares of the society is 2269, standing on the books as follows:



## Kean v. Colt et al.

---

In the name of R. L. Colt.....	2001 $\frac{1}{2}$
“ “ R. L. Colt, Jr.....	10
“ “ M. G. Colt.....	100
“ “ T. O. Colt.....	100

---

2211 $\frac{1}{2}$ 

Leaving 57 $\frac{5}{8}$  shares not owned by Roswell L. Colt and his sons. That there is, this day, standing to the credit of Roswell L. Colt, on the books of the society, \$2257.35, and that the said Roswell L. Colt is not indebted to the society, either on note, bond or otherwise, on this 11th December, 1845.

The second affidavit of Roswell L. Colt, made December 11th, 1845, states, among other things not necessary to be noticed, that he was not a director till 1814. That when he became a director, the affairs of the society were in a bad state. That at a meeting of the stockholders in June, 1814, the stockholders, on his motion, took into consideration the propriety of dissolving the society, and unanimously resolved that it was inexpedient, and that measures should be adopted to increase the funds of the society, so that they may renew their active manufacturing operations, and that the governor or deputy governor be authorized to sell such mill seats, house lots, buildings, &c., as, &c.

That on the 15th November, 1793, one Abijah Hammond was elected treasurer, but declined to give security, and therefore, on the 15th April, 1794, it was resolved that his appointment be vacated, and that he be desired to pay the moneys in his hands to the governor, and that the governor receive the same, or any other money due the society, and be authorized to sell and transfer such part of the stock of the United States Bank, standing in the name of the society, as will be sufficient to pay the drafts of Mr. Colt, the superintendent, (the defendant, Roswell L. Colt,) or other debts which he may be authorized to discharge, and that he be vested with all the powers of cashier and treasurer. That no cashier or treasurer was ever after appointed, till lately, but the funds have been in the hands of the agent of the society, under the superintendence and control of the governor for the time being. That no loss has happened by reason thereof, and no complaint has been made by any stockholder. That lately, on the 1st December, 1845, the

board appointed a treasurer, and have taken from him sufficient security, approved by the board, in \$20,000.

That the society have disposed of the lottery right, and that all the moneys received for it or on account thereof, have been paid to the society and passed to the proper account on the books of the society. That the deponent has expended large sums in erecting mills, &c., whereby the prospects of the society have been very much improved. That no stockholder except the deponent has advanced a cent to aid the society, or improve the property, but that the deponent has had to advance all his energies and a very large amount of money for this purpose.

That in February, 1793, the directors appointed a superintendent, with a salary of \$2500 per annum, and furnished him a suitable house, and authorized him to employ a clerk. That the deponent was appointed agent for the society in 1814. That the society have erected a large house on their ground in Pater-son, which house and grounds are now in his occupancy. That the plants, shrubbery, &c., are a subject of charge by this deponent, to his own account, and not to the debit of the society, and is not deducted from the profits of the society. That the furniture and expenses of living are paid for by him, out of his own funds, but he says he has never received any compensation for his services as governor, superintendent, or agent, until the board, on the 8th of July, 1839, in consideration of his services for near thirty years, resolved that a lease be executed for the joint lives of Mr. and Mrs. R. L. Colt, of the mansion-house and grounds within the board fence, at a nominal rent of \$100 a year, which lease has since been executed.

That he is now willing to purchase the said house and improvements at cost, and the lands attached thereto, at a fair price, if the society will make to him a fair allowance for his services, in lieu of said lease. That the society had out-lands which had been nearly unproductive, and have erected buildings thereon, stocked the farm and improved it, and carried it on, which, he is advised, they had a right to do; but if there has been any loss, either in the said mansion-house or the said farm, he and his sons suffer about ninety-eight per cent. thereof, and that the profit or loss of the said farm was to go to the society, and not to him individually.

---

Kent v. Colt et al.

---

That he has never invested one dollar of the society's money in the stock of the Bank of the United States, and he does not recollect or believe that he has received or used any money from the society, except what he has been charged with by the society. That the society bought of him, about 1838, mills, &c., which he held, and most of which had been built by him out of his own moneys, or moneys he had borrowed on his own account, from Robert Oliver and others, to aid the society, amounting to \$155,770.68, and also other property of great value to the society, for \$60,000, and, from other causes, became indebted to him in a large sum; and, to secure him, the society directed bonds and mortgages to be given to him, but that such bonds and mortgages were afterwards canceled, and that, on March 16th, 1840, the society were indebted to him in \$305,198.31.

That at a meeting of the board of directors, on that day, entries were made in the book of minutes of the society, as follows: "An offer having been made by R. L. Colt to purchase certain, &c., for \$200,000, resolved, that the society do agree to sell to said Colt the said house-lots, rents, &c., and reversions in fee, for \$200,000, as of the 1st February last; and that, as to the said water rights where no mill seats are conveyed, the said Colt and his assigns shall have the privilege of using said water on any mill seat on the tier of mill seats for which they are now leased, and that said Colt be charged, on the books of the society, with said \$200,000, as of the 1st February last."

That at this meeting, five of the directors were present. That, being indebted, at that time, to the executors of Robert Oliver, he assigned the said leases, water rights, reversions, and mills to them, in payment of his debt. That this was done openly and fairly, under the directions of the Chancellor. That he has not re-purchased any of the property so assigned by him to the said executors.

That the board did direct five bonds to be given to him, in all, \$80,000, to be secured by a mortgage, but they were afterwards given up and canceled. But the society is indebted to him, at this time, in \$22,057.35, and that it will so appear by the books of the society. That of the stock belonging to him, 2001 $\frac{2}{3}$  shares stand in his name, and that they are not in-



---

Kean v. Colt et al.

---

curambred in any way. That he is not now embarrassed in his circumstances. That since his former affidavit, he has transferred ten shares to his son, R. L. Colt, Jr.

The motion for injunction and receiver was argued on the bill and affidavits.

*B. Williamson and W. Halsted*, in support of motion. They cited 1 *Hill's Ch. R.* 390; 2 *Johns. Ch. R.* 30, 256; 1 *Paige* 396; 3 *Ibid.* 117; 8 *Wheat.* 421; 1 *McCord* 389; 3 *Yerger* 201; 8 *Pet.* 281, 286; 2 *Story's Eq.*, § 1252; 4 *Russell* 272, 562; 3 *Paige* 222, 233; 1 *Johns. Ch. R.* 26; 4 *Price's Exch. R.* 346; 6 *Cranch* 51; 1 *Green's Ch. R.* 190, 191; 1 *Edw.* 84, 513; 1 *Simons* 27; 19 *Johns. R.* 477; 8 *Cow.* 387; 4 *Johns. Ch. R.* 104; *Story's Eq. Pl.* 190, 191; 1 *Myln and Keen* 377; *Dess.* 154; 3 *Atk.* 564; 2 *Story's Eq.*, § 827, 831, 835, 836; 2 *Sim. and Stuart* 142; 8 *Paige* 475; 13 *Vesey* 105; 2 *Bro. Ch.* 157; 18 *Vesey* 283; 16 *Ibid.* 59; 3 *Meriv.* 697; 1 *Ball and Beatty* 75; 12 *Vesey* 4.

*P. D. Vroom and E. Vanarsdale, Sr., contra.* They cited *Drury on Inj.* 137, 192; 6 *Eng. Cond. Ch.* 498; 1 *Myln and Keen* 61; *Milf* 155; 3 *P. Wms.* 33; *Ang. and Ames on Corp.* 316, 344, 345; 1 *Johns. Ch. R.* 305; 1 *Vesey* 105, 131; 1 *Bro. Ch.* 303; 2 *Johns. Ch.* 238; 1 *Eq. Ca. Ab.* 73; 1 *Vern.* 31, 261; 1 *Mad. R.* 446; 1 *Hopk.* 599; *Saxton* 192; *Grant's Prac.* 332; 7 *Vesey* 309; *Saxton* 157; 1 *Green's Ch.* 173; 6 *Johns. Ch.* 160; *Ambler* 209; *Saxton* 369; 4 *Johns. Ch.* 21; 6 *Ibid.* 19; 1 *Coxe's Ch.* 103; 18 *Vesey* 515; *Saxton* 718; *Cooper's Eq. R.* 30; 12 *Eng. Cond. Ch.* 16; 16 *Vesey* 69, 70; 2 *Edw.* 286; 2 *Paige* 450, 351; *Ibid.* 438, 449; 6 *Johns. Ch.* 160; 2 *Kent's Com.* 304, 305, note; 2 *Johns. Ch.* 389; 19 *Johns. R.* 473, 474; 1 *Hopk.* 360, 598; 2 *Johns. Ch.* 371; *Saxton* 186; *Ang. and Ames on Corp.* 510, 664; 2 *Sch. and Lef.* 607; 2 *Mad. Ch.* 188; 2 *Bro. Ch.* 158; 13 *Vesey* 108, 266.

THE CHANCELLOR. The motions are denied. To enter fully into an examination of the case at this time would, I think, be unwise. To authorize an injunction and the appointment of a receiver, there must be a well-grounded apprehension of

---

Tucker v. Green.

---

injury about to be done. I see no sufficient cause of present alarm to demand the interposition of the court. The misconduct alleged in the bill occurred, if at all, several years since; too long since to be the ground of apprehension of impending mischief. No act is stated as now threatened, or misapplication of funds as about to be made.

Motions denied.

---

ENOCH G. TUCKER v. FRANCES GREEN, ADMINISTRATRIX OF  
JOHN D. GREEN, WHO WAS EXECUTOR, &c., OF ENOCH  
GREEN.

1. The administratrix of an executor held liable to a legatee under the will of which her intestate was executor, for the proceeds of bank stock belonging to the first estate, which was transferred by the executor to himself, in his own name, and which came to the hands of, and was sold by, his administratrix.

2. E. G. died in 1827, and by will gave several pecuniary legacies, and among them \$500 to his grandson, E. G. T., a minor, to be kept at interest by the executor of the will until E. G. T. attained the age of twenty-one, and then to be paid to him, with the interest which should have accrued thereon. And for the purpose of carrying his will into effect, and paying the debts and legacies, authorized the executor to sell so much of the real estate as might be necessary. He then gave all the rest of his estate, real and personal, to his son, J. D. G., whom he appointed executor. The legacies amounted to \$3000. The personal estate of E. G. was appraised at \$3071.23, including thirty-six shares of Trenton Bank stock, appraised at \$1260. In 1829 J. D. G., as executor of the will of E. G., transferred to himself, in his own name, the thirty-six shares of stock, and they stood in his own name at his death, in 1830. No administration *de bonis non*, with the will of E. G. annexed, was ever granted. Administration of the personal estate of J. D. G. was committed to his widow, F. G. In 1836 she sold the said stock for \$1360, and, as administratrix of J. D. G., transferred it to the purchaser. On bill by E. G. T., against the administratrix, &c., of J. D. G., for the payment of the said legacy, it was decreed for the complainant.

---

In March, 1827, Enoch Green died, leaving a will, by which, after directing his just debts and funeral expenses to be paid, he gave to his daughter, Maria Tucker, wife of Samuel Tucker, \$500, for her sole use, to be paid in three months after his decease; and to his daughter, Susan Carman, wife of Caleb Carman, \$500, for her sole use, to be paid as soon as conveniently

## Tucker v. Green.

might be after his decease ; and to his daughter, Sarah Hamilton, wife of Thomas Hamilton, \$1000, for her sole and separate use, to be paid as soon as conveniently might be after his decease ; and to his grandson, Enoch G. Tucker, \$500, to be put and kept at interest by his executors, and the survivor of them, on good real security, till his said grandson should attain the age of twenty-one, and then to be paid to him, with the interest which should have accrued thereon ; and to his granddaughter, Frances Carman, \$500, to be paid to her when she should attain the age of eighteen years ; directing his executors in the meantime to place and keep the same at interest on good real security, till she should attain that age, and to pay the interest thereof, yearly, to the mother of the said Frances. And for the purpose of carrying his will into effect, by paying the debts and legacies therein mentioned, and for whatsoever ends and purposes might be requisite thereto, he authorized and empowered his executors therein mentioned, and the survivor of them, to sell and dispose of all and singular his real estate, or so much thereof as might be necessary for the purposes aforesaid. And all the rest, residue and remainder of his estate, real and personal, whatsoever and wheresoever, he gave, devised and bequeathed to his son, John D. Green, his heirs and assigns forever. And he appointed his said son, John D. Green, and his nephew, Armitage Green, executors of his said will.

John D. Green proved the will, and acted as executor, and as executor and residuary legatee and devisee, took possession of all the estate, real and personal. Armitage Green did not prove the will or act as executor. The will was proved on the 3d of May, 1827. On the same day an inventory of the personal estate of the testator was filed in the office of the surrogate of Hunterdon, amounting to \$3071.23½, consisting of

A bond of.....	\$1,000 00
36 shares Trenton Bank stock, appraised at.....	1,260 00
Cash in bank.....	245 86
Notes, due-bills, and book accounts.....	180 37½
And furniture, &c.....	385 00

---

\$3,071 23½

On the 19th of January, 1829, J. D. Green, as executor of the will of Enoch Green, transferred to himself in his own name



---

Tucker v. Green.

---

the thirty-six shares of stock in the Trenton Bank, and they stood in his name at his death. In 1830, John D. Green died intestate, and administration of his personal estate was committed to his widow, Frances Green, the defendant in this cause. No administration *de bonis non*, with the will of Enoch Green annexed, was ever granted.

In January, 1831, Frances Green, as administratrix, &c. of John D. Green, filed an inventory and appraisal of his personal estate in the office of the surrogate of Hunterdon, amounting to \$7341.91, including the said thirty-six shares of bank stock, appraised at \$38 a share, \$1368. In January, 1835, Frances Green, as administratrix, &c., of John D. Green, sold the said bank stock for \$1360.80, and transferred it to the purchaser.

Enoch G. Tucker attained the age of twenty-one on the 7th July, 1838, and in 1841 exhibited his bill against Frances Green, administratrix, &c., of John D. Green, deceased, who was executor of the will of Enoch Green, deceased, for the recovery of the said legacy bequeathed to him by the will of Enoch Green, deceased. An answer was put in by the defendant, and the cause was heard on the pleadings and proofs.'

*J. C. Potts*, for the complainant.

*J. A. Simpson*, for the defendant.

THE CHANCELLOR. If anything occurred in the course of John D. Green's administration of the personal estate of Enoch Green, deceased, which would show that the transfer of the bank stock to himself was right and lawful, and that it thereby became rightfully his property, the defendant should have shown it. Personal property of the estate of Enoch Green, deceased, the testator, sufficient for the payment of this legacy, was converted by John D. Green, the executor of his will, to his own use, and is traced to the hands of the defendant, as administratrix of the personal estate of John D. Green. If there is any reason why it should not be applied to the payment of this legacy, she should have shown it.

I am of opinion that the proceeds of this stock may be reached in a suit by the legatee against the administratrix of the personal estate of John D. Green, deceased. 5 *Rand.* 51; *Elm. Dig.* 165, § 6; 1 *Story's Eq.*, § 581. Decree for complainant

# CASES IN CHANCERY.

JUNE TERM, 1846.

---

BENJAMIN P. SOPER AND MARY, HIS WIFE, v. PETER KIPP.

1. By writing under seal executed by heirs-at-law, it was agreed that P., one of them, should have the out-lots for his share, and that the other three should take for their shares the homestead farm ; and that P. would execute to the other three, separately, a release for the share which the three might agree that each of them should have in the homestead, when a certain mortgage given by the intestate on one of the out-lots should be discharged ; and that as soon as P. should execute such releases, the others should execute releases to him for the share which it was thereby agreed he should have. P. took possession of the share assigned to him by the agreement. Afterwards, by an agreement between the three, a certain part of the homestead was assigned to M., one of the three, and the other two released the same to her, and M. released to the other two all her interest in the residue of the homestead. Previous to the agreement among the four, H., one of the heirs, had given a mortgage on his undivided interest in the whole real estate. M. filed a bill against P. for the specific performance of the agreement on his part to release to her the share so assigned to her, tendering a release of her interest in his share. Neither of the said mortgages was paid at the time of the filing of the bill ; but *the mortgage given by the intestate was paid before the hearing of the cause*, and the mortgage given by H. on his undivided interest in the estate had been foreclosed, and his said interest sold ; and the complainant produced at the hearing an agreement by the purchaser to abide by the agreement for partition, and to execute releases under it. *Held* that performance of an agreement to execute a release of real estate may be decreed, and that performance may be decreed if the party asking it is able and willing, at any time before the decree, to perform his part of the contract.

2. It was referred to a master to ascertain whether the complainant was able to procure a release to P. from the present owner of H.'s share, and from the remaining heirs.

---

Soper v. Kipp.

---

3. Specific performance of an agreement among heirs for partition cannot be resisted on the ground that the defendant, in taking the part assigned to him, contemplated the sale of it, and that by reason of mortgages existing at the time of the agreement he was unable to sell the part assigned to him, he knowing of the mortgages at the time of the agreement, and one of them, given by the intestate, being paid before the hearing, and the other, given by one of the heirs on his undivided interest in the whole estate, having been foreclosed and such interest sold, and the complainant proffering a release from the purchaser of all his interest in the share to the defendant. *Held*, that under the circumstances, the other heirs were not necessary parties to the bill.

---

Peter A. Kipp died, intestate, leaving a widow, Mary Kipp, and five children, viz., Abraham Kipp, John Kipp, Henry Kipp, Peter Kipp and Mary Kipp, and leaving real estate, which descended to his said children. John Kipp sold his undivided interest in the real estate to his brother Abraham. An agreement in writing, under seal, was then made, dated May 17th, 1842, between Peter Kipp of the first part, and Abraham, Henry and Mary Kipp of the second part, reciting that they had mutually agreed that Peter should have for his share of the real estate, all the out-lots; and that Abraham, Henry and Mary should take for their shares, (including the share Abraham had bought from John,) the homestead farm; and agreeing that Peter and his wife should and would execute to the parties of the second part, separately, a release for the share which the parties of the second part might agree each one should have in the homestead, when the mortgage given by the intestate on one of the out-lots, for \$1500, should be discharged, or such arrangement in relation thereto be made as should be satisfactory to Peter; and that as soon as Peter should execute such releases, the parties of the second part, with the wives of Henry and Abraham, should execute releases to Peter for the share which it was thereby agreed he should have.

Peter took possession of the share assigned to him by the agreement.

Mary afterwards married Benjamin P. Soper, and by an agreement between Abraham and Henry, and Soper and his wife, Abraham and Henry and their wives, by deed of January 5th, 1844, granted and released to Soper and his wife 52<sup>80</sup>/<sub>100</sub> acres of the homestead, by metes and bounds, as the share of



---

Soper v. Kipp.

---

Mary; and in consideration thereof, Soper and his wife granted and released to Abraham and Henry all the residue of the homestead.

The \$1500 mortgage was given by the intestate for the benefit of one Browning, and Browning gave the intestate a mortgage of the same amount on property in Hoboken.

On the 19th October, 1841, Henry mortgaged his undivided interest in the real estate of the intestate to one Hall for \$1000, payable in three years, with interest.

The widow, Abraham and Peter administered on the personal estate of the intestate. They foreclosed the Browning mortgage, and in the spring of 1843, the Browning property was sold under the decree, and was bought by the administrators, or one of them, for the estate; and Abraham took a deed for it for the benefit of the estate, to pay off and satisfy the mortgage given by the intestate.

On the 5th January, 1844, Soper and wife tendered to Peter a conveyance and release of all their interest in the out-lots, and requested him to release to them the share of the homestead which had been assigned and released to them by Abraham and Henry; and presented to Peter the draft of a proper deed to be executed by him; and also presented to Peter a bond and mortgage for \$1500, executed by Soper, conditioned for the payment to Peter of one-fifth of any sum that might remain due on the \$1500 mortgage, in case of the insufficiency of the personal property and the Browning lands to pay the same. Peter refused to comply with the request.

Soper and wife thereupon, on the 15th of April, 1844, filed their bill, stating the foregoing facts, and stating that Peter, as one of the administrators, has in his hands a considerable amount of money belonging to the estate; that the intestate left a large personal estate, and owed debts to a small amount only; and that no settlement of the administrators' accounts had been made in the Orphans' Court; that on the said purchase of the Browning property by Abraham, for the benefit of the estate, Abraham, acting for the estate, gave Browning the privilege of selling the property in such portions as might be most advantageous for the estate and for Browning; and that there had been paid on the said mortgage \$600; and that the resi-

---

Soper v. Kipp.

---

due of the Browning property is sufficient, as the complainants are informed and believe, to pay the balance due on said \$1500 mortgage given by the intestate.

The bill prays that Peter may be decreed to perform the agreement, and to execute a release of the share so assigned to the complainant Mary; the complainants tendering themselves ready to perform on their part, and to make such arrangement, in relation to the \$1500 mortgage, as the court may direct, if that already made and offered should be decreed insufficient.

The defendant put in his answer, and proofs were taken.

Before the hearing of the cause, the \$1500 mortgage was fully paid, and the mortgage given by Henry, on his undivided interest in the real estate of the intestate, had been foreclosed and his said interest sold under the decree, and Mrs. Howard had become the purchaser thereof. She knew, before she bought, of the agreement for partition, and of certain releases having been executed under it; and the complainants produced at the hearing an agreement executed by Mrs. Howard, dated June 5th, 1845, to abide by the agreement for partition, and to execute releases under it.

*P. D. Vroom*, for the complainants, cited 1 *Pow. on Mort.* 18; 10 *Johns. R.* 414; 7 *Paige* 77; 8 *Ibid.* 473; 2 *Wheat.* 301, 304, *note*; 6 *Mad. R.* 161; *Colbert on Parties* 11; 3 *P. Wms.* 311; 1 *Ves. and Beam* 550.

*W. Pennington*, for the defendant, cited 2 *Story's Eq.*, §§ 741, 742, 748-51, 769-74, 778; 2 *Paige* 15; 1 *Pet.* 283, 308, 383; 1 *Green's Ch. R.* 199, 208; 18 *Vesey* 10; 3 *Paige* 94; 17 *Vesey* 398; 4 *Bro. Ch.* 519; *Saxton* 274, 281, 321.

THE CHANCELLOR. The bill is filed by Mary and her husband, to whom a share, by metes and bounds, has been assigned since the agreement, against Peter, to whom a share, by metes and bounds, was assigned by the agreement, to compel Peter to execute to the complainants a release of his interest in the portion assigned to them; they having tendered to Peter a release of their interest in the share assigned to him.

---

Soper v. Kipp.

---

It is contended, on the part of the complainants, that the agreement is distributive in its character, and binds Peter to execute to each of the other share-owners separately, a release of his interest in any share, whenever it should be set off by metes and bounds, by agreement between the other three ; and that, as that has been done in reference to Mary's share, the complainants are entitled to call on the defendant for a release of his interest in that share, without reference to any releases between Peter and the other share-owners. If this be so, there is no want of proper parties in the cause. I am inclined to think this is the true construction of the agreement.

The defendant alleges that his object in selecting the out-lots for his share was, that he might sell them, and that, by reason of the encumbrances, he could not immediately accomplish that object.

Two mortgages existed at the time of the agreement, and the weight of the evidence, to my mind is, that the existence of both was known to the defendant. This takes from the case all idea that the defendant was drawn into the agreement by concealment from him of anything which, if known to him, might have prevented him from entering into it. The only ground left the defendant on this part of the case is, that he misapprehended the effect of Henry's mortgage ; and that, when he came to carry out his object in selecting the out-lots, he found himself embarrassed by that mortgage. The question then arises, can the case be permitted to turn on proof of the object which the defendant had in selecting the out-lots ? Nothing is said of that object in the agreement. It would leave agreements for partition, and the action of a court upon them, to stand on very undefinable ground, if they could be influenced by proof of any particular object which one of the parties had in agreeing to take the part assigned to him, and that that object had failed.

The case, on this part of it, must stand on the same ground as if the defendant's object was to keep the part selected by him. He agreed to take that part ; and the court cannot look beyond that, and inquire whether he meant to keep it or to sell it. The defendant's possession of the part he agreed to take has not been disturbed. By the agreement he was to release



---

Soper v. Kipp.

---

to the others, separately, the share which the others might agree that each of them should have in the homestead, when the mortgage given by the intestate should be discharged, or such arrangement relating thereto be made, as should be satisfactory to him. This mortgage has now been discharged; and it is not material, as to the relief prayed, that it was not discharged at the commencement of the suit. So as to the mortgage given by Henry, on his undivided interest in the real estate. If the defendant's share has been relieved from the encumbrance of that mortgage; or, if the complainants are now able to procure a release to be executed to the defendant by the present owner of that undivided interest, of all the interest of that owner in the share taken by the defendant, the only object which the court can consider the defendant as having had in taking the share he selected can now be accomplished; and the time that has elapsed is not material. And if it can now be done, it is not material whether it was offered, or could have been done at the commencement of the suit, at least not as to the relief prayed.

A reference will be ordered, to ascertain whether the complainants are able to procure the release of Mrs. Howard, the present owner of Henry's undivided share, of all her interest in the share assigned to the defendant, and to ascertain how the title now stands. '

I think it better, also, in this stage of the cause, to direct the master to ascertain whether the complainants are able to procure the release of Abraham to be executed to the defendant.

If it shall appear that the complainants are able to procure the releases to be executed to the defendant, but that the defendant puts himself in a position to prevent their delivery to him, by refusing to execute proper releases himself, it appears to me that the case will call for such action of the court as will, notwithstanding, give the complainants the relief they seek. The question of costs is reserved.

Order accordingly.

---

Paterson v. Paterson.

---

## ELIZA PATERSON v. WILLIAM PATERSON.

Alimony pending the suit, and money to defray the expenses of it, allowed, on a bill by the wife against the husband for support and maintenance, charging that he had abandoned her and refused to maintain and provide for her.

Bill by the wife against the husband for support and maintenance, on the ground that the husband had abandoned her and refused to maintain and provide for her. The bill stated the pecuniary circumstances of the husband, and the amount of his daily earnings, and prayed also for alimony pending the suit, and money to carry on the suit. The bill states that the defendant is earning, by his labor, from \$1.87½ to \$2 a day; that he has from \$700 to \$900 in a savings bank in New York; that he sold his household goods, worth \$300, and owns a house and lot in Newark, which would rent for \$125 a year. That at one time he agreed to give the complainant \$500 for her support, but that, shortly after, he refused to give her anything, or provide for her in any way, and confessed a judgment to one Lewis, for the purpose, as she believes, of covering his real estate. That, shortly after confessing the said judgment, he told her he now had his property so fixed that she could get nothing from him, and that he never would pay a cent towards her support, unless compelled by law to do so.

The application for intermediate alimony and money to defray the expenses of the suit was heard on motion.

Affidavits were read on the part of the complainant, in support of the application.

The affidavit of the defendant was read in opposition, stating that he was compelled to break up house-keeping by the conduct of his wife, in removing, from time to time, and secreting in some private place in Newark, the beds and bedding and other articles of furniture, without his knowledge, and that he, immediately after, provided board for the complainant, in Mulberry street, Newark, where she boarded at his expense for ten or twelve days; and that, immediately after, he provided per-

---

Paterson v. Paterson.

---

manent board for her in Market street, Newark, suitable to his circumstances, to which place she removed, and that he intended permanently to board her there. That without his knowledge or consent, she left this place in two days, and went to her nephew's, in New York, and remained there against his wish and consent. That from there she went to live with one of her relations in Milton, Essex county, New Jersey, where she remained for six weeks or two months, still without his consent. That she left his bed and board without his consent, and so continued, although he was willing and did provide board for her, suitable to his and her circumstances. That he has real estate in Newark, worth about \$1000, subject to a judgment for \$650. That he has in the savings bank of New York about \$600, but that he has no command of or means of getting it, in consequence of the complainant's having secretly taken the deposit book. That he receives \$1.75 a day for his labor.

*A. O. Boylan*, for the application, cited 4 *Paige* 516, 643; 2 *Ibid.* 621; 1 *Edw.* 317, 255; 1 *John. Ch. R.* 108, 364, 441; 1 *Edw.* 62; 2 *Paige* 108; *Saxton* 386; 4 *Dess.* 33; *Elm. Dig.* 140, § 10.

*J. Chetwood*, *contra*.

THE CHANCELLOR. Under the circumstances of this case, I think it will be proper to direct a monthly allowance of \$12, to be computed from the first day of May last, and to continue till the further order of the court, to be paid by the defendant to the complainant, monthly, two months' allowance to be paid on the first day of July next; and the payment of the further sum of \$50 to the complainant or her solicitor, towards defraying the charges of the suit, on her part.

Order accordingly.



## JOSHUA BRICK ET AL. v. JOHN GETSINGER ET AL.

1. A large tract of pine land, owned in connection with a glass-factory, for the ordinary uses and purposes of which the owners, from time to time, cut wood from the pine land, was mortgaged. After the giving of the mortgage, a fire swept over a large portion of the tract, killing the timber standing on it. The mortgagors commenced cutting down the burnt timber, proposing to cut it all down, alleging that it was necessary to do so, as well to save the wood from rotting, as for the permanent benefit of the estate in reference to the new growth. The mortgagees filed a bill and obtained an injunction against the cutting. The bill did not pray a foreclosure, the whole money not being then payable. On answer, stating the facts as to the burning, and the propriety of felling the burnt timber, and offering to give other security for an amount equal to the value of the burnt wood which the mortgagors proposed to cut, a reference was ordered to ascertain such value, with a view of directing such security to be given.

2. It was said by the Chancellor, that if a large proportion, in value, of pine wood-land, mortgaged, be burnt over, and it be proper, to save the burnt wood from rotting, and for the permanent benefit of the estate, in reference to the new growth, that the burnt wood be cut off—the land being worth but little, without wood on it—it would be right that the burnt wood so cut should be applied towards paying the mortgage.

---

On the 16th of August, 1845, John Getsinger and Joseph Getsinger gave to the complainants their bond, conditioned for the payment of \$11,755.23, in two equal payments, at six and twelve months, with interest, and, to secure the payment of the bond, gave to the complainants a mortgage of the same date, on the glass-factory buildings and lots in Port Elizabeth, Cumberland county (describing them), containing ten acres; a lot of 39 acres, a lot of 315 acres, a lot of 45 acres, a lot of 50 acres, a lot bought of Samuel Compton, by deed of May 24th, 1833; a lot of 315 acres, a lot of 148 acres, a lot of 23 acres, a lot of 101 acres, a lot of 193 acres, a lot of 5 acres, a lot of 10 acres, a lot of 20 acres, a lot of 102 acres, a lot of 425 acres, a lot of 100 acres, a lot of 18 acres, a lot of 38 acres, a lot of 10 acres, a lot of 10 acres, a lot of 23 acres, a lot of 350 acres, a moiety of a lot of 171 acres—all in the township of Maurice River, in said county; and a lot of 200 acres, and a lot of 380 acres, in the township of Millville, in

---

Brick et al. v. Getsinger et al.

---

said county; and a lot in Port Elizabeth, of a quarter of an acre.

The bill states that \$1437.39 of the principal was paid on the 14th of February, 1846, and that \$4418.40 of the principal and interest of the first payment is due, by reason of which the estate mortgaged has become absolute, subject only to the equity of redemption.

On the 6th of February, 1846, the Getsingers and their wives, for \$1250, stated, in the deed, to be the consideration therefor, sold and conveyed the mortgaged premises to Charles Townsend, of Maurice River, and George B. Cooper, of Philadelphia. The bill charges that the premises consist, in part, of woodland, covered with wood and timber, growing thereon, and that, without the wood and timber, the complainants' security is greatly weakened and diminished, and that, since the conveyance to Townsend and Cooper, they and their workmen have cut down and carried off from the premises a large quantity of wood and timber; that there is still standing on the premises, a large quantity of timber and trees, and that Townsend and Cooper intend to cut down and carry away the same.

The bill prays that Townsend and Cooper may be restrained from cutting down or removing from the premises any wood or timber growing thereon, or from removing from the premises any of the wood or timber already cut down, and from committing any further waste. The bill does not pray a foreclosure or sale.

The joint and several answer of the defendants has been put in, in which the Getsingers say that the bond and mortgage was given, not for money loaned or property bought, but, in part, to secure debts to some of the mortgagees, and, in part, to indemnify the mortgagees, or some of them, against notes or securities on which they, or some of them, were liable, and that, as they have reason to believe, the actual amount due will, on a just and proper account, fall short of the nominal amount of the bond and mortgage. The defendants deny that only \$1437.39 has been paid, and say that, on the 17th of November, 1845, the Getsingers gave to Lee and Bailey, two of the complainants, a judgment bond for \$2433.43, on which judgment was entered, and that execu-

---

Brick et al. v. Getsinger et al.

---

tion was issued on the judgment, and that the execution was paid in full before the bill was filed ; and they insist that the sum included in the judgment and execution, was for the same debt included in the mortgage, and is to be deducted therefrom. The Getsingers say that on the 28th January, 1845, and after the said execution was in the hands of the sheriff, they had shipped, on board a schooner lying in Maurice river, 701½ boxes of glass to their agent in New York, and Brick, one of the complainants, told John Getsinger that the sheriff had seized or would seize said glass on the said execution, and obtained from the said John an order for the glass ; and that the complainants, or some of them, obtained the glass on that order, and have since sold it ; and John says he is unable to read English, and does not know precisely what the order contained, but he says it was obtained from him on the representation that the value of it should be applied in payment of said execution, and that Bickley, one of the complainants, expressly promised him it should go towards the execution ; and the defendants say the glass was worth \$1028, for which the defendants insist they are entitled to credit on the bond and mortgage. The defendants admit the conveyance from the Getsingers to Townsend and Cooper for \$1250, subject to the mortgage. They say that the mortgaged premises consist of the glass-works and lots on which they are situated, at Port Elizabeth, in Cumberland county, and of sundry lots and tracts of land in that county, which have been bought from time to time for the use of the glass-works, comprising in the whole about 3000 acres, the great portion of which is woodland, on which is timber and wood growing, much of which is fit for use, and the residue is of younger growth. That the motive which induced the purchase of so many tracts of land, was to secure a sufficiency for the permanent supply of the glass-works ; that lest the consumption should at any time exceed the natural increase, it was the habit of those carrying on the works heretofore, to purchase a quantity of wood occasionally, in addition to that procured from the property ; and the defendants, Townsend and Cooper, say they intend to pursue the same course ; and they further say that if without such aid the natural growth of the wood and timber should be insufficient to afford a permanent supply, there is wood and timber enough



---

Brick et al. v. Getsinger et al.

---

on the property to supply the demand for at least three years, without the purchase of any additional timber land. That of the said property, about 300 acres of wood and timber land were, in the spring of 1845, overrun by fire, which greatly injured and destroyed the growing wood; and that when enjoined from cutting, they were engaged with their workmen in cutting and felling part of the wood which had been thus injured and destroyed by fire; that they had cut about 25 acres of the same, and were using the wood for the ordinary purposes of the glass-works, and not committing any waste upon the property; that the burnt wood is unfit for market, and can be advantageously applied to no other purpose than supplying glass or iron-works; and that it is of great importance to the property, and the owners thereof, that the same should be cut without delay; that the greater part of the wood on the land burnt is pine, which, after being affected with fire, soon decays and falls, and is seldom worth cutting after the second summer. That the residue of the wood and timber on the burnt land is principally oak, which by reason of the fire becomes very hard, and continues so till it begins to decay. That about the second summer after the fire, the young scions begin to grow up from the roots, and the trees begin to decay, and afterwards to fall; and if not cut before they fall, the scions will be greatly injured if not destroyed by the falling of the timber. That the intention was to cut off the said burnt timber, so as to prevent its further decay and injury, and to apply it to the ordinary use of the glass-works, as they apprehend they had a right to do. That they were not cutting, nor did they intend to cut, on any other portion of the property at this time; and that to continue the injunction would be injurious to the defendants and to the property. That at the time the mortgage was given, the premises were used for the purposes of a glass factory; that the glass-works were on the premises at the time, and were and had been in operation at and before the mortgage was given; and that the mortgage was taken with the express understanding and knowledge that the mortgaged property was then used, and would continue to be used, for making glass; and they submit that as long as they continue to use the property in this way, and as all prudent owners would do under like circumstances, they cannot be

---

Brick et al. v. Getsinger et al.

---

considered as committing waste, or impairing the security of the complainants ; and they deny that they have any intention to do so. On the contrary, they insist that it would be for the benefit of all parties that the said wood should be cut down and removed without delay, and that it would be better to give it away than to suffer it to remain in its present condition. They say that it is a great injury and inconvenience to them to be deprived of the use of the wood and timber at this time ; that their furnace is in blast, and they are now obliged to purchase, at great loss, wood to supply their fires, or suffer great loss from the blowing out of the furnace. That they have committed no waste, unless the cutting aforesaid may be considered waste, which they deny ; and that they do not intend to commit any waste, or to cut down or carry away any timber or trees, except for the purposes aforesaid. They deny that the cutting and using the wood and timber so burnt and injured would, in any wise, diminish the security of the complainants, but say that, to suffer the same to remain, would do so, more especially if living and growing wood and timber had to be taken for the use of the works ; and they insist that if, by reason of the mortgage, no wood or timber whatever can be cut on the property for the use of the glass works, the value of the property will be materially diminished. That, since the payment admitted by the bill, without any allowance for payments claimed by the defendants, the property is now a better security for the amount due, as stated by the bill, than it was when the mortgage was given. That they have no desire or intention to affect the security of the complainants, but are desirous of prosecuting their legitimate business in the ordinary way ; and that, rather than suffer the inconvenience and loss that must result to them from remaining in their present situation, they are willing to give, and offer to give, under the direction of the court, undoubted security for the payment of such sum as, on a fair and proper adjustment, may appear to be due on the bond and mortgage.

On this answer a motion was made to dissolve the injunction.

*P. D. Vroom*, for the motion.

*W. Halsted*, *contra*.

---

Brick et al. v. Getsinger et al.

---

THE CHANCELLOR. I think there is no ground for apprehension that the defendants have any design to lessen the security of the complainants by waste or improper cutting. The difficulty in the case has arisen, no doubt, from the fact that three hundred acres of the woodland has been burnt over, and the wood and timber standing thereon greatly injured. The defendants say it was their intention to cut off the wood and timber from this burnt district of three hundred acres; and that it ought to be cut off, as well to prevent its loss by decay, as for the benefit of the property. I am not informed by the bill or answer how much wood the glass-works ordinarily use in a season, nor of the value of the wood as it now stands on the burnt district; nor can I say with certainty that the residue of the property is sufficient to pay the mortgage.

If a large proportion in value of pine woodland mortgaged be burnt over, and it be proper, to save the wood and for the benefit of the land, that the burnt wood be cut off, the lands themselves being worth but little without wood on them, it would be right that the wood so burnt and cut should be applied towards paying the mortgage.

In the absence of more particular information, it seems to me it would be safe for the court—regard being had to the rights of the mortgagees—to avail itself of the suggestion of the defendants Townsend and Cooper, so far as to direct security to be given by them for an amount equal to the value of the burnt wood which they propose to cut. To that end, a reference will be ordered, to ascertain the value.

Order accordingly.

CITED in *Coggill v. Milburn Land Co.*, 10 O. E. Gr. 92.



## THROCKMORTON OBERT v. PETER OBERT ET AL.

1. On bill for partition, injunction granted, restraining the party in possession from committing waste by cutting timber.

2. If the title of the complainant in a bill for partition is denied, the court may retain the bill to give him an opportunity to try his title at law.

3. An equitable partition may be made so as to assign a portion of the land on which improvements have been made to him who made them, and if he has cut off the timber from a part of the land adjoining the part improved, the court may direct that the land from which the timber has been cut be valued as it was with the timber on it and included in the assignment to him.

4. In special cases, one tenant in common may, on the application of the other, be enjoined from committing waste, but the jurisdiction is sparingly exercised.

5. On bill for partition, by a tenant in common owning a twentieth part, an injunction was granted against the tenant in common in possession, restraining him from cutting timber. His answer showed that he was owner of eight-twentieths; that he had made improvements to the amount of \$2000; and that he only intended to cut the wood and timber from two acres near the barn, which he had commenced doing when the injunction was served; and he denied all intention to commit waste. The injunction was dissolved.

---

The bill is for the partition of a farm of two hundred acres, of which it claims that George Obert, deceased, died seized, among the heirs-at-law of the said decedent; and for an injunction, restraining Peter Obert, who is in possession, from cutting wood and timber. The complainant, Throckmorton Obert, is one of five children of a son of the decedent, who died in the lifetime of the decedent; and the decedent left four children him surviving, viz., Peter Obert, Paul Obert, Nancy Obert and George Obert.

The bill states that the decedent died in March, 1820, and that the farm descended as follows: one-fifth to each of the said children, and one-fifth to the complainant and his brothers and sisters, as the heirs-at-law of the deceased son, John Obert; that after the death of his grandfather, the complainant's brother George died, whereby his interest was increased to one-twentieth of the farm. That Peter Obert possessed himself of the whole, and claimed to hold it all adversely to the other

---

Obert v. Obert et al.

---

heirs. That the complainant brought ejectment for his share, and that one Mahlon Hammell, a tenant of Peter, was admitted a defendant in that suit; that the said Hammell set up, in defence, a holding under Peter, and a deed from D. Smith and wife to Peter, dated June 5th, 1822, in consideration of \$500, and a deed from Peter, as administrator of the said George Obert, deceased, to Smith, dated June 4th, 1822, for \$500, purporting to have been made in pursuance of an order of the Orphans' Court of Middlesex county, to sell lands for the payment of debts. That a verdict was rendered for the plaintiff in the ejectment, on which judgment was entered in February, 1843; and that, by writ of possession, the complainant was put in legal possession of his twentieth part undivided.

That, during the ejectment, his sister Jane and her husband conveyed her twentieth to the complainant, and his aunt Nancy conveyed her fifth to him; and Paul Obert, as he is informed and believes, conveyed his fifth to the defendant Peter, so that the complainant now owns six-twentieths, the defendant Peter eight-twentieths; George Obert, son of the decedent, four-twentieths; Nancy, sister of the complainant, and her husband, Samuel Magie, one-twentieth; and Susan, a sister of the complainant, and her husband, Stephen Verity, one-twentieth. That William Simpson claims, through the defendant Peter, some interest in the farm.

The bill then charges that the personal estate of the decedent was sufficient to pay his debts; that the deed from the defendant Peter, as administrator, to Smith, and all the proceedings previous to the sale, were fraudulent and void; and that Smith was an irresponsible person, hired by Peter to bid off the property at the administrators' sale and convey it to Peter. That Peter has refused to concur in making a partition, and was, at the filing of the bill, either by himself or in connection with Simpson, felling and carting off the wood and timber, and disposing of it to his own use, and was committing great waste and other irreparable injury and mischief to the premises.

The bill prays an account of the wood cut, and a partition, and an injunction against cutting and carting off the wood and timber, and from committing any other waste; and that the title of the complainant, having been settled at law, may be

confirmed and quieted ; and that proper conveyances may be made. And that in case the court shall deem it necessary to stay the general partition until the titles may be settled as between said parties and claimants, then that the share of the complainant, or at least his twentieth settled in said ejectment, may be now divided off, without waiting for the settlement of all or any of the questions that may arise between the other co-tenants.

On a petition presented to the Chancellor before the filing of the bill, saying that the complainant had not time for the proper drafting of the bill, and stating the general facts contained in the bill, and that neither Peter nor Simpson, as the petitioner was informed and believed, was able to respond in damages, both being insolvent and bankrupt, an injunction was granted February 7th, 1844, enjoining Peter and Simpson, their workmen, &c., from cutting down or destroying the timber or other trees growing on the premises, or any part thereof, and from taking any wood or timber lying thereon, or any part thereof, and from doing further waste.

The separate answer of Peter Obert, filed July 11th, 1844, admits that he administered ; states that the personalty was insufficient to pay the debts, and that the proceedings preparatory to a sale of the lands were all just and *bona fide*. States that on the 3d June, 1822, he sold the farm to Smith for \$500, without any secret or other agreement that Smith should buy in the same for him. That at the sale the farm stood for a long time on the bid of James Dunham of \$300. That he took extraordinary pains to induce bidding ; that he urged Smith, among others, to buy, telling him and them that the property was worth more ; and that, finally, when all other inducements seemed to fail, he told Smith he need not run any risk, and that if he should buy the farm at less than \$800, and should become tired of his bargain, he, the defendant, would take it off his hands ; and that the farm, after all others had ceased to bid, was struck off to Smith for \$500, no one bidding more. That on the 4th June, 1822, he conveyed to Smith in fee, and not on any secret or other trust or confidence that Smith should hold for him, the defendant ; that Smith bought *bona fide*, and with lawful and just right to retain it. That Smith did repent,



## Obert v. Obert et al.

and apprehended trouble from the second wife, the widow of the decedent, and proposed to him, Peter, to convey to him, for the same sum, but he denies that Smith was under any obligation—moral, legal, secret or otherwise—to convey to him; and that on June 5th Smith conveyed to him; and he submits that in this there is nothing repugnant to law or equity. He states the principal vouchers showing the debts of the decedent, and that he is unable to produce the other vouchers; that all the vouchers were delivered to the surrogate, to enable him to state the administration account, and that very few, if any of them, other than those he has set out, were ever returned to him; and that he knows not what has become of them. That the lands of which the decedent died seized, were in detached pieces, and but a small portion of them was enclosed by fence of any sort. That some of them were scarcely worth enclosing, the wood having been cut off and wasted, and the land, in general, not being arable. That after he bought from Smith, he borrowed money from Ann Van Beuren, and gave his bond for it, and a mortgage on the premises, describing them as in the administrator's deed to Smith, and in the deed from Smith to him. That almost immediately thereafter several persons (naming them) claimed different portions of the land included in the mortgage as theirs, and as not belonging to the estate of the decedent. The claimants and portions so claimed are as follows:

David Freeman.....	8 $\frac{4}{10}$ acres.
J. S. Vanarsdalen.....	7 $\frac{5}{10}$ “
Henry Obert.....	35 $\frac{25}{100}$ “
Heirs of Robinson Thomas.....	14 “

That on a careful survey and examination, it was found that these several portions belonged to the claimants, respectively, and were no part of the estate of the decedent. That on the 10th May, 1835, he bought the portion owned by Freeman for \$45, and it was conveyed to him by Freeman and wife, by deed of that date; that on the 15th December, 1829, he bought the portion owned by Vanarsdalen, for \$50, and it was conveyed to him by Vanarsdalen, by deed of that date; that on the 20th April, 1830, he bought the portion owned by Henry Obert, and it was conveyed to him by Obert's attorney, thereunto lawfully authorized, by deed of that date, for \$116; and

that he made a verbal contract with the heirs of Robinson Thomas, for their portion, but has not yet been able to obtain a deed therefor. That, after deducting these portions, the farm contains but about 120 acres, being all the lands of which the decedent died seized, except certain lots (describing them) not brought in question by the bill.

That on the 15th of February, 1834, he, by deed, for a valuable consideration, conveyed to Lewis Slover about 70 acres of the premises in the bill mentioned, and that Slover took possession, and built a dwelling-house, and made divers improvements thereon, and resided there; and that the same has been since, by several mesne conveyances, conveyed to William Simpson; and that Simpson is now the owner of it, and has owned it since February, 1839.

He says that, in March, 1837, he demised to one George Hammell a part of the premises mentioned in the bill (describing it), containing about 60 acres, and that said Hammell was never in possession of any other of the real estate of the decedent, George Obert, since the death of said Obert.

He admits that, in December, 1842, the complainant obtained a verdict in ejectment for a twentieth part of the lands of which Hammell was in possession under the demise aforesaid, and that judgment was entered on the verdict; but he insists that the verdict was unjust, and founded, in a great measure, on false and garbled testimony, and a suppression of the truth; and that the verdict and judgment cannot be conclusive on him in equity; that the complainant has thought fit to give to a court of equity, by his bill, cognizance of the whole matter, and that he cannot recover in this court contrary to equity.

That Ann Van Beuren died in September, 1839, and that her administrator foreclosed the mortgage given by him, Peter, to her; and that, on the 19th of October, 1842, a final decree for sale was made; and that the sheriff, by virtue of a *fi. fa.*, issued under that decree, sold the premises to the said William Simpson, and conveyed the same to him, by deed dated May 19th, 1843, for \$495, being the whole of the premises mentioned in the complainant's bill.

That Simpson resides in New York, and is universally believed to be a man of large estate, real and personal; and that

---

Obert v. Obert et al.

---

at no time has he been suspected or believed to be a bankrupt, or insolvent. That he, the defendant Peter, is in possession of the premises, by the permission of Simpson, and at his will; that Simpson is his son-in-law, and that he has charge of the premises for Simpson. That when he bought the premises from Smith, and took possession, the buildings were in a ruinous condition—the house ready to fall down, being propped up by poles and stakes; the fences destroyed, and everything gone to wreck. That the defendant Peter built a new house, barn, and out-houses, erected fences, and bought lime for the land, and that his expenses, exclusive of his labor, exceeded \$2000.

He denies any waste of the premises, or of the wood or timber growing thereon, or any threat to commit waste. He says that, to pay a tax of eight dollars, buy manure for the land, and for fencing stuff, he concluded to clear a small piece of about two acres, and that, accordingly, in the early part of the winter before, he engaged three men to cut wood on the said two-acre strip, near the barn. That wood, not exceeding eight or ten cords, was cut and carried away, and that about three-quarters of a cord of the cut wood now remains on the ground; that he intended to clear the whole of said two acres, when the injunction was served on him, and that good husbandry and convenience required said strip to be cut off.

He says that the whole real estate was insufficient to pay the debts, and that there still remains due to him, \$1131.95, with interest from July, 1825, from the estate of the decedent, and he annexes to his answer a copy of his final account, allowed by the Orphans' Court, showing that the said sum is still due him. He denies that Smith was, in any shape, an agent for him in the purchase, or that Smith bought under any device, arrangement, or understanding with him, and denies that the Supreme Court ever adjudged the deed from him, as administrator, to Smith, to be void, and denies that he was ever made a defendant in any action of ejectment brought by the complainant, for the recovery of the premises, or any part thereof.

The answer of William Simpson states, among other things not material to our present purpose, that in February, 1839, he bought a tract of 70 acres (describing it), from Peter Obert, who was in possession thereof, as owner in fee, he having bought it



---

Obert v. Obert et al.

---

from Lewis Slover ; and that, for a valuable consideration paid by him to said Obert, Obert conveyed to him the said 70 acres. That said tract is a part of the land mentioned in the complainant's bill. That when he so bought, he had no knowledge, belief or suspicion of the complainant's claim thereto, or to any part thereof ; but perceiving and understanding that the premises had been sold under an order of the Orphans' Court, he believed that all the interest of George Obert, deceased, passed to the purchaser, and was, by mesne conveyances, transmitted to and vested in Peter Obert, son of George Obert, deceased, and he relied on the public and judicial acts of the Orphans' Court. He denies all knowledge of any fraud in the accounts of the administrator or in the order for sale. States his purchase at the sheriff's sale on the foreclosure of the Van Beuren mortgage, and that the said mortgage and decree included the lands he had bought of Peter Obert ; and that to protect himself, he bought them at the sheriff's sale for \$495, and paid the money to the sheriff ; that the sheriff, by deed of May 19th, 1843, conveyed the said premises to him in fee ; that the lands so conveyed to him by the sheriff, include all the lands mentioned in the bill. That he does not know whether Magie and wife, or Nancy Obert, made the conveyances to the complainant of their shares, as stated in the bill, but insists that if they did, the conveyances are void as against him. Says that neither Nancy nor Magie and wife have been, either actually or constructively, in possession since June, 1822 ; and that the premises have been held since that time by divers persons adversely to them. That the defendant, Peter Obert, is now in possession by his permission and at his will. He asserts the right to cut, but denies that any waste has been committed ; says he put the premises in the possession and care of the defendant, Peter Obert, and instructed him to use the same as good husbandry requires ; and that he is of opinion that the strip of woodland near the barn, of about two acres, on which alone some wood has been cut, ought to be cleared.

He says that it appears from the bill itself, that the complainant has not exhibited his claim to the lands within twenty years next after his title or cause of action, if he had any, accrued ; and that being an innocent purchaser for a valuable

---

Obert v. Obert et al.

---

consideration, and without notice of such dormant or concealed claim, he pleads the statute of limitations in bar. He denies his bankruptcy or insolvency, and says he has a clear income of more than sufficient to support his family, from unencumbered real estate.

On the 24th December, 1845, a petition on the part of the defendants was presented to the court, stating the filing of the bill of the complainant, and the petition for an injunction, and the answers of the defendants; and that in the term of October, 1844, the defendants, by their counsel, moved before the late Chancellor that the injunction be dissolved, for reasons stated in the petition; and that the argument of the motion was had in that term; and that the Chancellor left Trenton without announcing any decision from the bench. That neither the defendants nor their counsel received information of any decision of the Chancellor till about three months thereafter, when their counsel discovered in the chancery clerk's office a writing, signed by the Chancellor, as follows: "Let the injunction be modified, so as to limit it to timber not necessary for the ordinary uses of the farm;" dated October 28th, 1844.

The petition further states that no more formal order was prepared for the signature of the late Chancellor. That if the said writing is to be considered as an order of the court, the petitioners consider it erroneous. That the injunction has not been modified, but remains in its original shape. It prays a re-hearing, or else that the court will entertain, *ab origine*, the motion to dissolve the injunction.

A certificate is annexed to the petition, signed by two counsel, saying that they are of opinion that a re-hearing ought to be granted as prayed in the petition. An order was thereupon made that a motion to dissolve the injunction be brought to argument on ten days' notice.

The motion was argued at the March Term, 1846.

*W. Scott*, for the motion.

*R. S. Field*, *contra*

THE CHANCELLOR. The combination of facts, as gathered from the bill and answers, upon which, as it seems to me, the

present motion must be decided, are as follows: George Obert died, the bill says, in March, 1820—the answer says in 1821—intestate, seized of a farm of 120 acres, leaving four children him surviving, and five granchildren, the children of a son who died in his lifetime. The complainant is one of the said five grandchildren, and the defendant Peter G. Obert is another of the said grandchildren. After the death of the intestate, one of the five granchildren died, unmarried, and without issue, by which the shares of the complainant and the defendant Peter, respectively, were increased to a twentieth; and the bill states that, by purchases of other shares, the complainant became entitled to six-twentieths, the defendant Peter to eight-twentieths, and that George Obert is entitled to four-twentieths, and each of two other granchildren, to one-twentieth. The defendant Peter administered, and, on the 4th of June, 1822, by order of the Orphans' Court of Middlesex, sold the farm, for the payment of debts, to D. Smith. On the 5th of June, 1822, Smith conveyed the farm to the defendant Peter. On the 15th of February, 1834, Peter conveyed 70 acres of the farm to one Slover, who took possession thereof, and built a dwelling-house and made other improvements thereon; and this tract of 70 acres, by mesne conveyances from Slover, became vested in the defendant Simpson, in February, 1839. Previous to 1835—the precise time when does not appear—the defendant Peter mortgaged the farm to Ann Van Beuren. On the 19th of October, 1842, a final decree for the sale of the premises under this mortgage, was made, and, at the sheriff's sale thereof, May 19th, 1843, the premises were bought by Simpson, for \$495. In March, 1837, Peter rented 60 acres to George Hammell, and the complainant in this bill brought an ejectment against Hammell. Hammell appeared and defended. The consent rules were exchanged September, 1837. In December, 1842, a verdict for a twentieth part was obtained against Hammell in the said ejectment, and in February, 1843, judgment was entered on the verdict, and a writ of possession was executed. The bill says that, during the ejectment, the complainant bought two other shares, but it does not say at what time during the ejectment. The bill was filed, and the injunction granted in February, 1844.



The defendant Simpson says he is an innocent purchaser, for a valuable consideration, and without notice of any such dormant claim as is set up by the complainant. The defendant Peter went into possession of the whole farm, on getting his deed from Smith, and continued in possession of the whole, claiming title, till he sold the 70 acres to Slover, in 1834, and that has been held adversely ever since; and Peter remained in possession of the residue, by himself or his tenant, claiming adversely, till Simpson bought at the sheriff's sale, under the Van Beuren mortgage, in 1843, which mortgage was given by Peter, and the title, as claimed adversely against the heirs, is now all in Simpson, and Peter occupies under him.

The first question is, is the title of the complainant to an interest in the whole farm, the premises of which he seeks partition, sufficiently established to enable this court to proceed with the partition, or to authorize the continuance of the injunction? The complainant in this suit, by ejectment against a tenant of 60 acres under Peter, recovered a judgment for a twentieth part of the 60 acres. The 70 acres had been sold by Peter, in 1834; no ejectment has been brought for that; and about twenty-two years have elapsed since the deed from Smith to Peter. If the verdict and judgment against Peter's tenant of the 60 acres, be equivalent to a verdict and judgment against Peter, it cannot settle the title as to the 70 acres. For aught that appears, Slover was a purchaser of the 70 acres, for a valuable consideration, without notice, and, at any rate, Simpson, who holds by mesne conveyances from Slover, says, in his answer, that he is such a purchaser.

Next, what amount of interest, in the complainant, in the 60 acres, can be at all considered as settled by the ejectment against Peter's tenant? The bill says that the complainant, during the ejectment, bought other shares, and, at the time of filing the bill, was entitled to six-twentieths. But those shares have been held adversely since 1822, and are still so held. The ejectment was commenced as early as 1837, within about fifteen years from the commencement of the adverse possession, and cannot establish the complainant's title in February, 1844, the time of filing the bill, to any interest in the 60 acres, more than the twentieth part for which the verdict and judgment were render-

ed. Besides, the bill does not say at what time during the ejectment the complainant bought other shares—it may have been after the lapse of twenty years.

The only title, then, in the complainant, which can be considered at all established by the ejectment, is to a twentieth part of sixty acres of the premises of which he seeks partition. The interest of Peter, or those claiming under him, is eight-twentieths. If, then, the deed from Smith to Peter, and all the subsequent conveyances, could be set aside, we should have the case of one tenant in common owning a twentieth, asking and obtaining an injunction against the owner of eight-twentieths, in possession of the whole or of nineteen-twentieths, from cutting any wood or timber during the pendency of a suit in this court for a partition instituted by the owner of the other twentieth.

But, under the case made by the bill and answer, the question whether such an injunction should be continued, is still a more serious question. In the first place, it appears by the answer, that the dwelling-house and other buildings on the premises were in a ruinous condition when Peter got the title claimed by him, and entered into possession under it; and that he put new buildings on the premises, and improved the lands by manure, at an expense, altogether, of \$2000, besides his own labor. It certainly could not be expected, under these circumstances, that the injunction, as prayed by the bill and granted, restraining Peter from cutting any wood or timber, could be continued. The Chancellor, when the motion was made, in October, 1844, to dissolve the injunction, modified it by limiting it so as to restrain Peter from cutting timber not necessary for the ordinary use of the farm. This was eighteen months ago. No progress has since been made in the partition suit; and the motion now is, to dissolve the injunction entirely.

The defendants say that they intended to cut the wood and timber from two acres near the barn, and had commenced doing so when the injunction was served, and deny that this would be waste, and deny all intention to commit waste. Would this be an irreparable injury to the complainant, or tend to prevent his getting his full twentieth, if the partition suit proceeds? An equitable partition may be made so

---

Obert v. Obert et al.

---

as to assign that portion of the land on which improvements have been made to the person who made them. 1 *Green's Ch. R.* 341. And I see no reason why the court could not direct that, in making the partition, the value of these two acres proposed to be cut off should be estimated as it was with the wood and timber on it, as well as that the land occupied by the new buildings should be valued as it was with the old buildings on it.

In *Elmer's Dig.* 383, § 19, it is provided that, on a division in any of the cases under the statutes for partition, if any tenant in common, or person claiming under him, hath, before division, cut off any timber, or committed any waste or destruction on the premises, the commissioners shall estimate the damage, and divide the premises so that such tenant shall be charged with it, and have a share proportionably less in value.

There are, no doubt, special cases in which an injunction will be granted between tenants in common to stay waste, but the cases are rare, and the jurisdiction is sparingly exercised. In 3 *Bro. Ch. Rep.* 621, the Chancellor said he had no idea of an injunction to stay waste where the person applying for it is tenant in common with the person in possession, who has therefore an equal title to the possession with him; but, it appearing in that case, that they were only equitable tenants in common, the legal estate being in a trustee; and that therefore the person committing the waste had no title to the possession; and it being sworn that the party cutting was insolvent, the Chancellor granted the injunction. It may be remarked here, that the charges of insolvency made in the bill in this case, are fully denied by the answers.

In *Hale v. Thomas*, 7 *Ves.* 589, *Ld.* Eldon said he never knew of an instance of an application to stay waste by one tenant in common against another; that a case of malicious destruction might be a ground; and, in *Tworl v. Tworl*, 16 *Ves.* 128, the same Chancellor said that his experience did not furnish him with a single instance of an injunction between tenants in common; and that he had refused injunctions between tenants in common, except in special cases. The case before him, he said, was a special case, one of the tenants in common having become the occupying tenant of the other, and



having by that contract engaged, as to one moiety, to treat the land as an occupying tenant should treat it; and on this ground he granted the injunction; stating expressly, in the order, that the defendant was occupying tenant to the plaintiff; and restraining him from committing any waste upon the premises which he held as such occupying tenant. This, he said, was a safe principle, and would, by its necessary operation, prevent the defendant from committing any waste. This ground, and that of destruction or insolvency, seem to be the special grounds on which the jurisdiction has been exerted. This last case was on a bill for partition, and motion for injunction.

The case of *Hawley v. Clowes*, 2 *Johns. Ch. R.* 122, which was a bill for partition and injunction to stay waste, was, probably, the case or the authority on which the Chancellor, when a motion to dissolve was made before him eighteen months ago, retained the injunction in part, limiting it as before mentioned. In that case, the plaintiff and defendant owned the land as tenants in common, in equal undivided moieties; and there was no dispute about the title; and a motion was made to dissolve without answer, on the ground that one tenant in common cannot have an injunction against another. The bill charged that the defendant was cutting down the timber, and threatening to persevere, and was sworn to; and there was no answer. The Chancellor modified the injunction, confining it to timber not wanted for the necessary use of the farm. He said that the authorities admitted that an injunction between tenants in common could be granted in special cases, as where the defendant was sworn to be insolvent, or where the waste was destructive to the estate, and not within the usual and legitimate exercise of enjoyment; and that he thought it fit that, pending a suit for partition, the tenant in common in possession should not be permitted to strip the land of its timber. I think this principle of Chancellor Kent a safe one, but I cannot think the case we are considering is, under the answers filed, within the principle.

It is proper to forbear from any remarks on the question of title.

Let the injunction be dissolved.

CITED in *Hall v. Piddock*, 6 *C. E. Gr.* 314; *Coffin v. Loper*, 10 *C. E. Gr.* 444; *Polhemus v. Empson*, 12 *C. E. Gr.* 195.

---

Warne v. Morris Canal and Banking Co.

---

## WILLIAM M. WARNE v. THE MORRIS CANAL AND BANKING COMPANY.

1. In 1832, the owner of a mill-seat leased to a canal company, for three years, at an annual rent, the privilege of diverting water from the stream, at a point above and beyond his land, into the canal. He then sold his mill-seat to a third person, reserving by the deed all right, interest and demand against the company for the use of the water, which he then had, or which either of the parties to the deed might thereafter have, as freely as if he had not conveyed the mill-seat. The company paid the grantor of the mill-seat the rent for the three years. After the expiration of the lease, the company continued to use water diverted from the stream without paying for it. In 1845, the grantor filed a bill praying an account and payment of the rents, and an injunction restraining the company from diverting the water. The injunction was denied.

2. Where there is a remedy at law, and nothing to show that the damages which might be awarded at law could not be realized, and nothing of the character of irreparable damages, an injunction will not be granted.

---

In June, 1832, William M. Warne, being seized of a lot of land of sixteen acres, near the canal of the Morris Canal and Banking Company, in Warren county, on which lot he had mills in operation, driven by the waters of the Hopatcong and Brasscastle creeks, which united some distance above his said lot, and after the junction flowed through the same; and the said company wishing to use the water of the Brasscastle, to increase the supply of water for their canal, the company entered into a negotiation with Warne for the purchase of the right to divert the water of the Brasscastle, either permanently or for a time, alleging (as the bill states) that the necessity for using it in the canal would be temporary only, until the banks of the canal should become tight. Warne, believing that the want of water for the canal would be permanent, wished them to buy his whole right. After negotiation between the company and Warne, the company leased from Warne the privilege of taking the water from the Brasscastle for three years, at the annual rent of \$250, and thereupon cut a sluice, by which they turned the water of the Brasscastle into their canal. The company paid Warne the stipulated rent for the three years.

---

Warne v. Morris Canal and Banking Co.

---

On the 19th of January, 1833, Warne sold and conveyed his said land to H. M. Winter, reserving by the deed, to himself, his heirs, &c., "all right, title, interest, property, claim and demand, both in law and equity, against the Morris Canal and Banking Company, for the use of the water of the Brasscastle, which he then had, or either of the parties to the said deed might thereafter have, as fully as if he, the said Warne, was still in possession of the premises and had never conveyed the same."

After the expiration of the three years the company continued to take the water without any further agreement with Warne, and, (the bill states,) as he supposed, with the intention of using it as his tenants from year to year, at the same rent.

On the 21st of October, 1844, the canal and its appendages, and the chartered rights of the said company, were sold under a decree of this court, and the purchasers at that sale, or persons holding under them or associated with them, are using the canal and exercising the chartered rights of the said company.

In July, 1845, Warne filed his bill against the Morris Canal and Banking Company, stating the foregoing facts, and that the company have neglected and refused to pay him any rent since the expiration of the said lease, or to make him any adequate compensation for the use of the water, or to make any proper arrangement with him for the future use of the water; and praying an account, and payment of the rent since the expiration of the lease, and an injunction restraining the company from using the water, and from turning the same into the canal, and commanding them to restore the same into its natural and ancient channel.

On the filing of the bill, the complainant gave notice to the defendants of a motion for an injunction pursuant to the prayer of the bill.

The motion was argued on the bill.

*S. R. Hamilton*, for the complainant.

*F. T. Frelinghuysen* and *William Halsted*, for the defen-



---

Warne v. Morris Canal and Banking Co.

---

dants. They cited 6 *John. Ch.* 46 ; 3 *Paige* 213 ; 1 *Green's Ch. R.*

**THE CHANCELLOR.** There are, perhaps, some questions in the case which ought to be settled at law, for the purpose of establishing the complainant's right, before the court should act by injunction. There is, also, a difficulty in the way of an injunction growing out of the length of time during which the complainant has slept over his rights, if he has any. But aside from these matters, it is clear that in the present position of things, this is not a case for the interposition of this court by injunction.

It is not an application by the owner of a mill-seat, to prevent the obstruction or diversion of the stream. An injunction is sought by the complainant as a means of compelling the company to make him compensation for the use of the water. This must be its only object ; for the complainant having conveyed the mill-seat, has no use for the water himself. The only benefit he can derive from his present position, under the reservation in his deed to Winter, (assuming that such a reservation is good,) is from the actual use of the water by the defendants ; and there is nothing to show that an action at law would not yield him any compensation a court of law might award him ; and there is nothing of the character of irreparable injury to the complainant by the defendants' use of the water.

Motion denied.

## ABIJAH MANN, JR., v. JOHN BRUCE AND CHARLES BRUCE.

A defence not raised by the pleadings cannot be raised by proofs. *Sembla.* On a bill filed by a receiver for the creditors and stockholders of a corporation, it is not necessary to make the creditors and stockholders parties.

---

Bill for the foreclosure of a mortgage given by John Bruce and Charles Bruce to James Ballagh. The mortgage was assigned by the executors of Ballagh's will to George D. Strong; and by Strong to Joseph D. Beers, president of the North American Trust and Banking Company, his successors and assigns; and by the said Beers to Thomas G. Talmage, president of the said company, his successors and assigns; and by the said Talmage to Henry Yates, Thomas G. Talmage and William C. Noyes, trustees, to have and to hold to them, their executors, administrators and assigns; and by the said Yates, Talmage and Noyes to Abijah Mann, Jr., the complainant, to have and to hold to him, his heirs and assigns.

John Bruce put in an answer, admitting the facts stated in the bill, except as to the assignments; and as to them, he says it may be true that the assignments were made as stated in the bill, but that he is a stranger thereto, and cannot form any belief concerning the same, and therefore leaves the complainant to his proofs.

The assignments were proved.

The defendants put in proof that Abijah Mann, Jr., the complainant, was receiver for the creditors and stockholders of the North American Trust and Banking Company; and that this mortgage came to his hands in that character.

*B. Williamson*, for the defendants, contended—1st. That the bill should have stated the complainant's character as receiver; 2d. That the *cestuis que trust* should have been made parties.

*D. A. Hayes, contra.* He cited 1 *Johns. Ch. R.* 349, 437; 1 *Green's Ch.* 305; 11 *Ves.* 444; 16 *Ves.* 321; 2 *Johns. Ch.* 197; 4 *Paige* 34.

---

Mann v. Bruce.

---

THE CHANCELLOR. The mortgage is assigned to Abijah Mann, Jr., (the complainant,) his heirs and assigns, without stating him to be receiver. The answer does not set up that he is receiver, but admits the facts stated in the bill, except as to the assignments, of which the defendant says he is ignorant, and leaves the complainant to his proof thereof.

A defence not raised by the pleadings cannot be raised by proofs.

It is said that the defendants might have a good defence against the North American Trust and Banking Company. If they had, they should have set up the defence in the answer, and that the complainant was only receiver; or, if they did not know, when the answer was filed, that the complainant was receiver only, they should have asked to amend the answer, for the purpose of showing that, and of setting up their defence.

Under the form of the assignment to the complainant, I apprehend that if the fact of his being receiver only had been set up in the answer, it would have put no difficulty in the way of a decree on the bill as it stands, unless the defendants had also set up a defence against the company.

As to parties, if it had appeared by the bill that the complainant was receiver only, it would not have been necessary to make the creditors and stockholders of the company parties. It would be oppressive to require it.

Decree for complainant.



---

Hulmes v. Thorpe.

---

## HIRAM HULMES v. MOSES THORPE.

1. On a bill by a vendee for the specific performance of an agreement for the sale of lands, if the vendee has performed a valuable part of the contract and is in no default as to the performance of the residue, performance will be decreed.

2. A slight variation or default, on the part of the vendee, in the performance of work to be done by him before the deed was to be delivered, will not prevent a decree for specific performance if the difference is a proper subject for compensation in money.

3. In decreeing performance, the court may give a day and prescribe equitable conditions.

4. *Semble.* That, as a general rule, the court will not make a decree that a husband who has contracted to sell lands shall procure his wife's execution and acknowledgment of the deed.

---

Bill for specific performance, filed August 7th, 1843. By articles of agreement dated March 19th, 1840, Moses Thorpe agreed to sell, and Hiram Hulmes to buy, a lot of land described in the agreement, supposed to contain forty-one and a half acres; and if it should not hold out, the quantity was to be taken from another lot of Thorpe's described in the agreement, in a specified shape and position; Thorpe reserving the saw-mill on the premises to be used for fifteen months from the date of the agreement; provided, that on whatever money, property, making of coal and labor that should be paid and performed by Hulmes on or before November 1st, 1840, no interest should be demanded; at which time the parties were to settle, and Thorpe was to deliver a good and sufficient deed, clear of all encumbrances, or as soon as half the purchase money was paid, when Hulmes was to give his bond and mortgage on the property for the balance, with interest, in two equal annual installments, Hulmes to be permitted to pay by cutting timber sufficient to make one hundred turns of coal of one hundred bushels each, on the northeast end of a lot of fifty acres of Thorpe's, called the home lot, cutting the stumps low, and making the timber into as good coal as the timber and season would permit, and delivering the coal at the Russia forge and coal house, and

---

Hulmes v. Thorpe.

---

stocking all that was not worked off the bank in the forge ; for which Thorpe was to allow \$3.75 for each hundred bushels, as payment on and for the land ; and Hulmes agreed to make and deliver from sixty to one hundred loads of said coal by November 1st, 1840, the two last payments to be made in the same way, by Thorpe's finding timber not a greater distance from the forge than the land he bought of Ryerson and Sharpe. And Hulmes was to cut, draw, and saw, at the mill, such stuff as Thorpe might direct, and deliver at the mill to Thorpe, properly stuck, half the boards, plank and scantling of all the logs, on whatsoever land he should cut off, for the said coal wood.

By a supplement to the agreement, and as an explanation of the understanding of the parties, it was provided that Hulmes was to commence delivering coal on or before September 1st, 1840, and to continue to deliver coal sufficient to keep one fire at the forge in operation.

On the execution of the agreement, Thorpe delivered possession to Hulmes. Hulmes began to deliver coal September 1st, 1840, and continued to deliver coal, and before November 1st, 1840, delivered (as the bill states) sixty turns, equal to six thousand bushels, amounting, at the stipulated price, to \$225. And the bill states that on the said first of November, 1840, Thorpe, the defendant, was indebted to Hulmes, the complainant, for work and labor, oats, and the use of the barn ; and that on that day, he, the complainant, went to Thorpe's house for the purpose of having a settlement, but that Thorpe had gone to Illinois.

In the following season, Hulmes continued to make and deliver coal at the forge ; and on or before November 1st, 1841, had delivered, (the bill states,) including that delivered the preceding year, 9150 bushels, amounting to \$343.12½. And the bill states that the complainant had a further account against the defendant, which, with the account before mentioned and the coal delivered, amounted to \$350, the first payment, and the interest on so much thereof as remained unpaid on the 1st of November, 1840.

The bill states the performance, on complainant's part, of the other terms or items of the agreement, stating, as to the sawing

---

Hulmes v. Thorpe.

---

of the logs, that Thorpe neglected to give him directions as to how they should be sawed, till June, 1843, when the water had become too low to saw, and that it remained too low till the filing of the bill. And the bill states that Hulmes has, several times, called on Thorpe to furnish the timber from which to make the coal for the residue of the purchase money, and that Thorpe has neglected to do so.

On the 4th of October, 1841, the parties made another agreement, for the sale by Thorpe and the purchase by Hulmes, of another lot of 100 acres, called the Allen lot, and also the remaining part of the house lot, containing  $70\frac{1}{2}$  acres, called the Rorick survey, except the part thereof before sold by Thorpe to Hulmes, the consideration for the last sale being \$1200, \$100 of which, Thorpe acknowledges to have then received, the balance, \$1100, to be paid as follows: \$100 on the first of November, 1841, when Thorpe was to make a good and sufficient warrantee deed, clear of all encumbrances, and Hulmes was to give his five bonds, of \$200 each, payable on the 1st of November, 1842, 1843, 1844, 1845, and 1846, with interest, and a mortgage on the premises, executed by him and his wife to secure the same; and this agreement contained a provision that if any claim should arise, or any prosecution be commenced on any claim that then existed against the lands, whereby Hulmes should be put to any damage, Thorpe would pay the same, and that, if judgment should be obtained against the land by reason of any claim then existing, whatever Hulmes should pay, not exceeding the yearly payments, Thorpe should allow as so much paid on this agreement. That, on the execution of this agreement, Thorpe delivered to Hulmes the possession of the premises, Hulmes then paying him \$100. On the 23d of November, 1841, Hulmes paid to Thorpe the second \$100, which Thorpe received as of the 1st of November, 1841, (the bill stating that Hulmes made inquiry for Thorpe on the 1st of November, 1841, and could not find him, he having gone to Illinois.) The bill states that, on paying the second \$100, Hulmes offered to give the bonds and mortgage, on Thorpe's giving the deed, and that Thorpe refused so to do, but offered a deed executed by him alone, and not by his wife, and which was also defective in the description of one of the lots;



---

Hulmes v. Thorpe.

---

and that Hulmes, for these reasons, declined taking the said deed.

The complainant has continued in possession of the premises, and, the bill says, has greatly improved the same, and has frequently requested Thorpe to perform the several contracts, and offered to perform on his part, if Thorpe would comply.

In ———, ———, Thorpe brought ejectment against Hulmes, to recover possession of the lands mentioned in both agreements. The bill states that, on the 28th of July, 1843, Hulmes tendered to Thorpe \$221, the amount for which the first bond was to be given, under the second agreement, and the interest thereon, and four bonds and mortgages, according to the terms of that agreement, and also another bond, dated July 25th, 1843, for \$350, and interest from November 1st, 1840, payable in coal, according to the first agreement, in two equal annual payments, from said July 25th, 1843, and a mortgage on the lands in the first agreement mentioned, executed by Hulmes and his wife to secure the same, and thereupon requested the deed for said several lots, and that Thorpe replied that he was not ready, and never would be prepared to give a deed executed by his wife, saying he had been divorced from the woman who was formerly his wife.

The bill prays a specific performance of the said two agreements, and that a deed, executed by Thorpe and his wife, may be decreed to be delivered to the complainant, sufficient to convey the lands, free from all encumbrances, and an injunction against the ejectment.

The injunction was allowed.

The defendant put in his answer, to which a replication was filed, and testimony was taken on both sides.

The cause was brought to a hearing on the pleadings and proofs.

*W. Halsted*, for the complainant. He cited 1 *Vesey* 446, 450; 1 *Atk.* 12; 1 *Sim. & Stu.* 500; 2 *Ib.* 29; 6 *Wheat.* 528, 534; 5 *Oranch* 262, 274; 9 *Ib.* 456; 1 *Stra.* 555; 1 *Term. Rep.* 638; 1 *Fonb. Eq.* 185 (note), 190, 191; 2 *Story's Eq.*, § 717 (a), 747, 771, 775; 7 *Vesey* 474.

---

Hulmes v. Thorpe.

---

*P. D. Vroom*, for the defendant. He cited 2 *Wheat*. 336 ; 2 *Scho. and Lef.* 553, 554 ; 18 *Vesey* 10 ; *Saxton's Ch.* 281 ; 2 *Story's Eq.*, § 769, 776 ; 12 *Vesey* 395 ; 1 *Coxe's Ch.* 258 ; 6 *Vesey* 349 ; 1 *Pet. Rep.* 383 ; 5 *Vesey* 720, *note* ; 15 *Ibid.* 228 ; 1 *Ball and Beatty* 68 ; *Newland on Cont.* 242 ; 2 *Story's Eq.*, § 731-4, *and note* ; 1 *Mad. Rep.* 9 ; 4 *Bos. and Pul.* 267.

THE CHANCELLOR. By the first agreement, that of March 19th, 1840, Thorpe was to convey a lot of forty-one and a half acres, as described in the agreement ; and, if it fell short, was to make up the quantity from another lot described in the agreement ; and was to make the conveyance as soon as Hulmes should pay him \$700, with interest from April 1st, 1840, except that no interest was to be demanded on the amount that Hulmes should pay in money, property, making coal and labor on or before November 1st, 1840, at which time the parties were to settle, and Thorpe was to deliver a good and sufficient deed, clear of all encumbrances, or as soon as half the purchase money should be paid, when Hulmes was to give a bond and mortgage for the balance, with interest, in two equal annual installments ; Hulmes to be permitted to pay by cutting timber and making one hundred turns of coal, of one hundred bushels each, on a lot of fifty acres of Thorpe's, called the house lot, and delivering the coal at the Russia forge ; for which Thorpe was to allow \$3.75 for each hundred bushels, as payment on the land ; and Hulmes agreed to deliver from sixty to one hundred loads of coal by November 1st, 1840. The two last payments were to be made in the same way, Thorpe finding timber not a greater distance from the forge than the land he bought of Ryerson and Sharpe. Hulmes was to commence delivering coal on or before September 1st, 1840, and to continue to deliver coal sufficient to keep one fire at the forge in operation. There are several minor particulars in this agreement, which may be noticed hereafter.

On the execution of the agreement, Thorpe delivered possession to Hulmes. It will be observed that, by this agreement, Hulmes was not required to pay half of the purchase money by November 1st, 1840. He was required to deliver from sixty to

---

Hulmes v. Thorpe.

---

one hundred loads of coal by that day ; on which day, or as soon as half the purchase money was paid, Thorpe was to make the deed, and Hulmes to give the bond and mortgage. The answer admits that Hulmes commenced delivering coal on the 1st of September, and continued so doing up to November 1st, 1840, but says that Thorpe does not believe that the amount delivered before that day exceeded 4250 bushels. The bill states that sixty turns, equal to 6000 bushels, were delivered before that day. There is no complaint that Hulmes did not deliver, between these periods, sufficient to keep a fire in the forge in operation ; and the difference between the defendant's belief as to the quantity and the statement of the bill arises from Thorpe's belief as to the number of bushels contained in a turn. From the statement in the bill, 4250 bushels would make sixty loads, of seventy bushels and a fraction each.

The answer admits that, in 1841, Hulmes continued to deliver coal till on or before November 1st, 1841, but says that he, the defendant, does not know how much was delivered before that day, but believes it did not exceed 6400 bushels, and that he has no means of ascertaining the quantity more definitely. The • bill states that the amount delivered, in all, on or before November 1st, 1841, was 9150 bushels, amounting, at the stipulated price, to \$343.12½ ; and that, before November 1st, 1840, the complainant had an account against the defendant, for work and labor, oats, and the use of the barn, amounting to \$17 ; and that, on the 1st of November, 1841, he had a further account against the defendant, and that these accounts, added to the coal delivered before November 1st, 1841, amounted to \$350, the half of the purchase money, and the interest due by the terms of the contract.

The defendant admits that, on the 1st of November, 1840, he was indebted to Hulmes for work and labor, but not exceeding three dollars, and says he is unable to state the amount more definitely ; and that, before that day, he had procured from Hulmes ten bushels of oats for seed, on the understanding and agreement that the same quantity should be furnished to Hulmes in the spring of 1841, for seed, or otherwise ; and that, before November, 1840, he hired of Hulmes half his barn for five dollars, to be paid April 1st, 1841 ; and that he believes that com-



---

Hulmes v. Thorpe.

---

plainant's accounts against him, except for coal, did not exceed fifteen dollars, and that he has no means of ascertaining the amount more definitely. Thorpe admits that he left the state, for the State of Illinois, about the 1st of November, 1840, but says he cannot state more definitely the day he left. I am satisfied, from the answer and the testimony, that he left before the 1st of November, 1840. In March, 1841, Thorpe returned to this state, and Hulmes went on to deliver coal in the season of 1841, as before stated.

The bill states that on the 23d of November, 1841, the complainant offered to give the bond and mortgage, according to the contract, on Thorpe's giving the deed, and that Thorpe refused to do so, but offered a deed executed by him alone, and not by his wife, and which was also defective in the description; and that the complainant, for these reasons, declined taking the deed, and that the complainant has frequently requested Thorpe to perform, and offered to perform on his part, if Thorpe would comply on his part.

Thorpe admits that he offered Hulmes a deed for the premises, executed by him alone, and also defective in the description, and that Hulmes refused to receive it, on the ground of the defective description, and says that this was on or about November 1st, 1841; but he says he does not recollect whether or not, and does not believe that Hulmes refused to receive the deed on the ground, or alleged that the defendant had a wife who ought to execute the deed. The answer further says that on the 7th of July, 1842, the complainant, with his, the defendant's, consent, caused a deed to be prepared for the purpose of sending it to Indiana, to be executed by one Annis Thorpe, formerly his wife, and that he sent it accordingly, but that he did so, not in compliance with any obligation on his part, but only to satisfy the complainant. He says that on the 14th of September, 1843, since the filing of the bill, he received, by mail, the said deed, executed and acknowledged by the said Annis, and that he showed it to the complainant on the 16th of October; and he admits that the said deed, or any other deed executed by the said Annis, was never, before the filing of the bill, offered to the complainant, though he says that on said October 16th he offered to deliver the said deed to the complainant, with

---

Hulmes v. Thorpe.

---

a proper deed executed by him, and requested the complainant to *pay the money* due him on the agreement. He says that said Annis deserted him on or about December 1st, 1836, &c.

He says that on or about January 14th, 1843, he delivered to the complainant, in the street, near the complainant's house, a notice to fulfill the contract or give up possession, and requested him to receive a deed for the premises ; and that, at that time, he tendered a deed duly executed and acknowledged by him, giving a correct description of the premises, and containing the usual covenants, and sufficient, as he is advised and believes, under the said agreement, and that he informed the complainant of the contents thereof, and that the complainant might have seen the same if he had chosen to do so ; and that he thereupon requested the complainant to perform on his part. He admits that on that occasion the complainant asked him, and Webb, who was with him, to walk with the complainant into the house, but denies that the complainant said he would arrange the business then. He admits that on the 28th of July, 1843, the complainant requested him to deliver a deed, and insisted that the agreement required the conveyance or release of Annis Thorpe, and that he, the defendant, replied that he was not and never would be prepared to give a deed executed by the said Annis ; and stated that he had no wife, entitled to dower, and that he thereupon offered the complainant a deed duly executed and acknowledged by him, on the payment of the *money* due, and the execution of the bond and mortgage. He admits that he has insisted, and he now submits, that after the lapse of time which has occurred, the consideration mentioned in the contract should be paid in money. He says that on or about July 1st, 1842, the complainant, for the first time, as far as he recollects, and as he believes, declared he would not comply, unless he, Thorpe, would procure a deed executed by said Annis, and insisted that the agreement required such a deed, and the defendant insists that no such deed was required by the agreement.

Among the exhibits on the part of the defendant is a deed, dated July 7th, 1842, between Thorpe, of the first part, and Hulmes, of the second, purporting to have been executed by Annis Thorpe, by her mark, with a certificate of a justice of

---

Hulmes v. Thorpe.

---

the peace of Indiana annexed, that Annis Thorpe, wife of Moses Thorpe, acknowledged, &c., (in the usual form of acknowledgment by a married woman.) This certificate is dated August 18th, 1843. There is also annexed to this deed a certificate of the mayor of Madison, in Indiana, dated April 16th, 1844, that on that day Annis Thorpe acknowledged, &c., (in the usual form,) that she executed the deed, stating that she had acknowledged it before, and that she understood the first acknowledgment was illegal in New Jersey.

From the case, as thus far developed, it seems to me to be plain that the complainant is entitled to a specific performance of this agreement. He has performed a valuable part of the contract, and so far as yet appears, is in no default as to the performance of the residue, unless his declining to take a deed without the execution of it by Thorpe's wife is a default.

The question whether the court will decree that a husband shall procure his wife to join in a conveyance, has been spoken to in this case. If it appears that the wife objects, I do not see how the court can make such a decree. If a vendor asks specific performance of an article like this, stipulating for a good and sufficient deed, clear of all encumbrances, the court would not compel performance by the vendee, unless the wife joined in the deed. And where the vendee asks performance, and it appears satisfactorily that the wife of the vendor refuses to join, the result would only be that the vendee would have his election, to take a deed without the wife's signature, or resort to his action at law for breach of the agreement. But in this case it is contended, on the part of the vendee, that inasmuch as it appears that the wife is willing to execute the deed, her willingness having been shown by her twice acknowledging the deed so as aforesaid exhibited, there can be no objection to a decree that a deed be given by Thorpe's wife.

According to the doctrine of this court, a decree that a thing be done puts the party in the same position as if it was actually done, though it be refused. It may be that the wife's acknowledgment of the deed in this case should be considered as equivalent to her express consent to execute it, and that on this ground the court would be justified in making a decree that Thorpe deliver a deed executed by him and his wife. But it



---

Hulmes v. Thorpe.

---

would be safer for the court to decree the delivery of the deed already executed by her and perhaps it would be safer for the complainant.

As to the difference between the parties in reference to the amount of the coal delivered and the accounts of Hulmes and Thorpe on the 1st of November, 1841, it is very small; and even if there was a slight deficiency, it would not prevent a decree, for the difference could be compensated in money. But in this case it seems to me that the complainant honestly thought and still thinks, that the coal delivered, and his accounts against Thorpe for property and work and labor, under the terms of the agreement, amount to the sum, on the payment of which, he was to have the deed.

It was admitted in argument that if Hulmes put himself on the ground that he had paid half, and would do no more till he got the deed, and the proof sustained him, his position would be good. Thorpe had gone to Illinois before November 1st, 1840, and the settlement contemplated by the agreement to be made at that time could not be made; and there is evidence, I think, sufficient to show that Hulmes went to Thorpe's that day for the purpose of making such settlement.

Again, the bill states that on the 23d of November, 1841, the complainant offered to give the bond and mortgage, according to the contract, on Thorpe's giving the deed; and that Thorpe offered a deed executed by him alone, and also defective in the description, which Hulmes, therefore, refused to accept. The defendant admits that about the 1st of November, 1841, he offered such a deed, and that Hulmes refused it. No objection was then made by Thorpe that Hulmes was not entitled to his deed because he had not paid half. No settlement was asked by Thorpe, to see if Hulmes had paid half, but a deed confessedly defective was offered. If a good deed had been offered, a settlement might then have been gone into; and if it had appeared that Hulmes had not paid half, he could have paid the balance of the half in money.

The answer admits that in or about March, 1842, the complainant called on the defendant and requested him to furnish the timber from which to make more coal, insisting that he had already made coal to the extent alleged in the bill, which the

---

Hulmes v. Thorpe.

---

defendant says he did not then, and does not now admit. Why was not a settlement then gone into, as to what amount had been delivered? Did the defendant then deny the complainant's statement? There is no evidence that he did.

Again, the defendant says that, on the 14th of January, 1843, in the street, near the complainant's house, he tendered a deed, executed by him, giving a correct description, and informed the complainant of the contents thereof, and that complainant might have seen it, if he had chosen, and that he thereupon requested the complainant to perform on his part; and he admits that, on that occasion, the complainant asked him to walk into the house, and that he refused to go in. Here was another proper occasion for a settlement as to the amount that had been paid, and, if it had turned out that Hulmes had not fully paid the half, he could have paid the balance in money.

Again, the defendant admits that, on the 28th of July, 1843, the complainant requested a deed, and insisted on a deed executed by Annis Thorpe, and that he replied that he never would be prepared to give such a deed, and tendered a deed executed by him. No difficulty seems to have been made, at any time, as to the amount that had been paid. Hulmes claimed that he had paid the half, and I see no reason to doubt that, if there had been no difficulty about the deed, and, on a settlement, at any of these periods, it had appeared that there was still due a balance on the half, Hulmes would have paid it in money. I think that Hulmes is in no such default, in this respect, as should induce the court to deny him a specific performance. The case, in this part of it, as to the general question, whether performance should be decreed, must stand on the same ground as it would if Hulmes had confessedly paid the half.

There is no difficulty arising from lapse of time, in this case. The agreement was made in March, 1840, and the bill was filed in August, 1843; and I see no such change of circumstances as should induce the court to refuse a decree. It would occupy too much time and space to examine, particularly, the complaints of the defendant as to the alleged minor defaults of the complainant, and the testimony respecting them. The items in reference to which the defendant complains that the

---

Hulmes v. Thorpe.

---

complainant did not perform the contract, are—that the greater part of the stumps were not cut low; that the coal was not made as good as the timber and season would allow; that, as near as he can state, and as he believes, a quarter of the coal not worked off the bank at the forge, was not stocked; that the complainant did not cut and draw to the mill all the saw-logs, though he admits he cut and drew a large proportion of them. The defendant denies that the complainant was ready or willing to saw the logs and deliver half thereof, stuck, at any time prior to December, 1842, and says that, during the years 1841 and 1842, he frequently requested the complainant to draw and saw them, and directed him into what stuff to saw them. That in March, 1842, he directed the complainant to saw timber for a small frame house, according to a bill to be furnished by De Wolf, and that he is informed and believes that the bill was furnished in May or June, 1843. He admits that, except this, he has not given the complainant any directions as to the sawing of the logs. He says that the water in the stream has been, at all times, sufficient, since March, 1843, to drive the mill and saw all the timber.

No such default, in any of these respects, is shown, as should prevent a decree for performance. A slight variation or default is not important, if the difference is a proper subject of compensation in money. 2 *Moll.* 588; 7 *Monro* 142. And as to all these matters, I think the weight of testimony is so strongly in favor of the complainant, that I should be unwilling to delay the cause, with a view of ascertaining whether the complainant, before a decree should be made for the specific performance of the agreement, should not make compensation for defaults, in some of these particulars. Again, the defendant, after all these alleged defaults, offered to deliver a deed executed by himself.

The second article was an agreement to convey for a money consideration of \$1200, \$100 of which was paid on the execution of the article, and the balance of which was to be paid as follows: \$100, November 1st, 1841, when Thorpe was to make a good and sufficient warrantee deed, clear of all encumbrances, and Hulmes was to give his five bonds, for \$200 each, payable on the 1st November in each of the five following years, with interest, and a mortgage on the premises, executed by him



---

Hulmes v. Thorpe.

---

and his wife, to secure the same. On the execution of this agreement, and the payment of \$100, Thorpe delivered possession to Hulmes. On the 23d November, 1841, Hulmes paid the second \$100, and Thorpe received it as of the 1st November, 1841.

The bill states that, on paying the second \$100, Hulmes offered to give the bonds and mortgage, on Thorpe's giving the deed; and that Thorpe offered a deed executed by him alone, and not by his wife, and which was also defective in the description; and that Hulmes, for these reasons, declined taking the deed. Thorpe admits that on or about November 1st, 1841, he offered Hulmes a deed for the premises, executed by him alone, and also defective in the description, and that Hulmes declined receiving it, on the ground of the defective description; and the defendant says he does not recollect whether or not, and does not believe, that Hulmes refused it on the ground, or alleged that the defendant had a wife who ought to execute the deed.

Thorpe says that on or about July 1st, 1842, the complainant for the first time, as far as he recollects, and as he believes, declared he would not comply unless he, Thorpe, would procure a deed executed by the said Annis, and insisted that the agreement required such a deed. He says that on the 14th January, 1843, he tendered to the complainant, in the street near the complainant's house, a deed duly executed and acknowledged by him, giving a correct description of the premises, and informed the complainant of the contents thereof; and that the complainant might have seen it if he had chosen to do so; and that he thereupon requested the complainant to perform on his part. He admits that on that occasion the complainant asked him and Webb, who was with him, to walk into the house, as stated in the bill, but denies that the complainant said he would arrange their business then, as stated in the bill.

It thus appears that it was not till January 14th, 1843, that Thorpe offered a deed with a correct description. The bill states that on the 28th July, 1843, the complainant tendered to Thorpe \$221, being the \$200 and interest thereon for which the first bond was to be given, and four bonds and a mortgage, according to the terms of the agreement, and thereupon re-

---

Hulmes v. Thorpe.

---

requested the deed ; and that Thorpe replied that he was not and never would be ready to give a deed executed by his wife. The defendant admits that on that day the complainant requested a deed, and insisted that the agreement required the conveyance or release of the said Annis ; and that he made the answer stated in the bill. And he admits that on that day the complainant stated that he then and there had \$221, as the amount of the second payment and interest thereon, and the four bonds and mortgage, as stated in the bill, and says that he thereupon requested the complainant to allow him and another person to count the money and examine the papers ; and that the complainant refused to allow him and such other person to do so ; and he denies that the complainant otherwise offered to perform, or otherwise tendered, &c., and says he has no knowledge or information of the contents of the said papers, except from the statement of the complainant ; and that if they were tendered, they were not, with the said money, a sufficient compliance with the agreement ; and that he was not bound to accept them.

He says that on the 7th July, 1842, the complainant, with his consent, caused a deed to be prepared for the purpose of sending it to Indiana, to be executed by the said Annis ; and that he, at complainant's request, immediately sent it ; that he did so, not in compliance with any obligation on his part, but solely as a gratuitous act, at complainant's request, and to satisfy him. That since the bill was filed, he received the deed, executed and acknowledged by the said Annis ; and he admits that no deed executed by the said Annis was ever offered to the complainant before the filing of the bill. This is the same deed spoken of and described in that part of this opinion which relates to the first agreement, it being, or purporting to be, a conveyance, in one deed, of the lands described in both agreements.

The statement of the foregoing facts in reference to the second agreement is sufficient, I think, to show clearly that there is nothing in the way of the relief sought by the bill as to this agreement, except the difficulty as to the form of the decree growing out of the fact that the defendant has a wife. In reference to this, the view taken in considering the course to be adopted on the first agreement applies here.

---

Hulmes v. Thorpe.

---

I am of opinion that, in reference to both contracts, the complainant is entitled to the relief he seeks. What mode shall be prescribed for the performance, on the part of the complainant, of the first agreement? It is said that in suits for specific performance, the court may modify the agreement so as to do justice, if circumstances require it. 1 *Peters* 376. I do not see that justice, in this case, requires any modification except as to time, nor does it appear that the circumstances of the defendant, in reference to the stipulations of the agreement, are so changed as to require a different mode of payment from that contracted for by the complainant.

There is no reason to believe, from anything appearing in the case, that the defendant has not timber land within a proper distance from which to make coal. We are relieved, therefore, from the difficulty which might have been presented if the defendant, since the agreement, had sold his timber lands. And as to time, if the complainant is to perform by making coal, one and two years would be reasonable; and if money payments are to be substituted, the same time would be reasonable. In decreeing performance, the court may give a day or prescribe equitable conditions. 1 *A. K. Marshall* 162.

The complainant could not tender in money under this contract; but the defendant submits, in his answer, that if performance be decreed, the decree should direct the payments to be made in money. I do not feel satisfied, under the evidence in the case, to give such a direction against the consent of the complainant; but it might prevent much future trouble and vexation to the parties, and perhaps to the court, if the complainant will consent to it.

A reference to a master will be necessary, to ascertain whether there is any balance due Thorpe for the half of the consideration on the first contract. If there is, that balance should be paid in money.

Decree for complainant.



---

Commercial Bank v. Reckless.

---

**THE COMMERCIAL BANK OF NEW JERSEY v. JOSEPH W.  
RECKLESS ET AL.**

1. Allegation of the delivery of a bond and mortgage not sustained by the evidence offered.

2. The possession of a mortgage, obtained from the clerk's office by the person named therein as mortgagee, without the consent of the mortgagor, and after he had refused to deliver the bond to secure which the mortgage was drawn, is no evidence of the delivery of the mortgage.

3. To constitute the delivery of a deed, the grantor must part, not only with the possession, but with the control of it, and deprive himself of the right to recall it.

4. To make the leaving of a deed, by the grantor, with the clerk, for registry, and the registration thereof, a good delivery to the grantee, it must be left for the grantee, or with such directions from the grantor as to amount to a delivery and authorize the grantee to take it from the clerk.

5. The denial in the answer, of the material allegation of the bill, which denial is supported by a witness for the defendant, cannot be overcome by a single witness in support of the allegation of the bill, though there be discrepancies in other matters between the answer and the witness for the defendant.

---

The statement of the bill in this case is, that Joseph W. Reckless, being indebted to "The Commercial Bank of New Jersey" on four promissory notes, drawn by said Reckless, and endorsed, respectively, by another person, and discounted by the said bank, being renewals of previous notes of long standing, for the better securing the same, and as collateral security therefor, on the 5th March, 1841, executed his bond to the said bank, conditioned for the payment of \$3600, the amount of said four notes, and, to secure the payment of the sum mentioned in the condition of the said bond, executed, with his wife, the mortgage set forth in the bill; that the mortgage was acknowledged by J. W. Reckless and wife, on the day of its date, and was registered on the 24th March, 1841. That after the execution of the bond and mortgage, they were delivered to the complainants. That J. W. Reckless, or some person for him and in his name and by his authority, under the plea or pretence of procuring the assignment of a certain policy of insurance on the premises, to the complainants, and the assent of

---

Commercial Bank v. Reckless.

---

the insurance company to the assignment, shortly after the delivery to the complainants of the bond and mortgage, procured them from the complainants, with the full understanding and belief of the complainants that they were to be returned to the complainants when the object for which they were taken was accomplished. That the mortgage was returned to the complainants, but that Reckless, at all times thereafter, refused to deliver up the bond to the complainants, and that the bond remains in the possession or under the control of Reckless.

The complainants charge that the bond was actually delivered to them with the mortgage, and insist that their rights are not affected by the detention of the bond; and further insist that "as the mortgage was given as security for the payment of the notes, to the amount specified in the mortgage and bond, their right in such security is good and perfect, independently of the bond, which was not the evidence of the debt, but merely designated the amount for which security was given."

J. W. Reckless, in his answer, admits his indebtedness on the notes, and says that on the 5th March, 1841, and for several weeks previous, he was sick and confined to his house and bedroom, and that during his illness he was applied to from time to time, and importuned by the bank to secure the notes by a bond and mortgage on property at Amboy; which he repeatedly refused to do, because he had no property except what he acquired by his marriage, and which, by an agreement with his wife before marriage, he was bound to convey in trust for her; that being debilitated in mind and body by his sickness, he was so far overcome by the importunities of the bank that he had a bond drawn up, of the description mentioned in the bill, and also the mortgage mentioned in the bill, and which is now in the complainants' possession; and that on the said 5th March, 1841, Judge Potter came to his room where he was confined, and he executed the bond in the presence of the said judge, and he and his wife executed the mortgage and acknowledged it before the said judge; but that neither the bond nor the mortgage was ever delivered by him, or by his authority, to the complainants or to any person for them; and that the bond has never been out of his possession; that immediately after the bond and mortgage were signed, he deter-

---

Commercial Bank v. Reckless.

---

mined in his own mind never to deliver them, for the reason that the property embraced in the mortgage was the property of his wife, and was agreed to be secured to her, as before stated; and that he never did deliver them; that a few days after the mortgage was signed, his son Anthony, at the request of the said defendant, took the mortgage out of his possession, and went with it to the clerk's office for the purpose of procuring a certificate of search; and, as he is informed by Anthony and verily believes, Anthony took the mortgage to the clerk's office and left it there, with the direction to have a search made as to encumbrances on the property; and that without his knowledge or authority, and, as he is informed and believes, without the knowledge, direction or consent of Anthony, the complainants procured the mortgage from the clerk's office; and that they obtained possession of it without his consent or knowledge, and contrary to his wishes and intentions; that neither he, nor any person by his authority, ever called at the bank and procured the mortgage or bond, for the purpose mentioned in the bill; that Anthony went to New York, after the bond and mortgage were signed, and without having the mortgage, to obtain a renewal of an old policy of insurance on the premises, taking the old policy with him, and did obtain the renewal; and that he is informed by Anthony, and verily believes, that Anthony never obtained the mortgage from the bank for that or any other purpose.

Mary Ann Reckless, the wife of Joseph W. Reckless, answering for herself, says that she signed the mortgage with her husband, at the time and place and in the manner stated by him; that she never knew of any delivery of the bond and mortgage to the complainants, or any person for them; and that she knows no matter or thing variant from the facts stated by J. W. Reckless in the answer, or in any way inconsistent therewith; and that she knows no additional fact concerning the execution or delivery of the bond and mortgage.

Joseph W. Reckless, further answering, says that since the date of the bond and mortgage, the complainants have sued and obtained judgments on the said several notes, and issued executions, and caused the property described in the mortgage, with other property, to be levied on and advertised for sale; and



---

Commercial Bank v. Reckless.

---

that his wife and her trustee exhibited their bill in this court, claiming the property by virtue of the trust deed referred to in the bill, and obtained an injunction restraining the complainants from selling the property under the said execution.

The defendants admit that, on June 11th, 1842, they conveyed the premises to Nathan Satterthwaite, and say that, before their intermarriage, the said Mary Ann was seized in fee of the premises, and it was agreed between them, previous to their marriage, and that it was the agreement on which the marriage contract was entered into, that all the property of the said Mary Ann, real and personal, should be conveyed to a trustee, upon such trusts as would secure the same for her use, and beyond the control, and free from the debts and liabilities of her said husband; and that the conveyance to the said Nathan was made in pursuance of the said ante-nuptial agreement, upon certain uses and trusts, and subject to certain powers and limitations mentioned in the deed, (referring to the deed.)

A replication was filed, July 22d, 1844. A decree *pro confesso* was taken against the other defendants in October, 1843.

Anthony Reckless sworn for the defendants.—[A bond being produced by J. W. Reckless, and shown to the witness, marked Exhibit 1 on the part of the defendants, he says]—It is signed in the handwriting of his father, J. W. Reckless, and is the bond referred to in the mortgage; that he was present when the bond and mortgage were signed by his father; they were signed at his father's house in Amboy, he thinks, about ten days or two weeks after they bear date; his father was then confined to his house by sickness, and had been, for two or three weeks; he was not confined to his room at the time he signed the bond and mortgage; during his sickness he had been confined to his room, but not to his bed; after they were signed he took them into his possession; they were delivered to him by his father; he placed them with his private papers in a small trunk; and, in the course of two or three days, he took the mortgage to New Brunswick, for the purpose of showing it to the clerk, as a description of the property on which he wished to get a certificate that it was unencumbered; previous to taking it to New Brunswick, he did not show it to any one;

---

Commercial Bank v. Reckless.

---

when he took the mortgage to New Brunswick he left the bond in the trunk ; he gave the mortgage to Mr. Booraem, the clerk, in New Brunswick ; he gave no instructions to have it recorded ; he was never authorized or directed by his father to have it recorded ; he does not know why the clerk recorded it ; when he saw the clerk the next day, he asked him for the certificate and mortgage ; the clerk gave him the certificate, and said he had left the mortgage in his office to be recorded, which he said was probably done ; he told the clerk he was very sorry he had had it recorded, as he, the witness, did not intend to have had it done ; the clerk said he supposed witness wanted it recorded, and therefore he had it done ; this conversation took place in the street, in New Brunswick, near Stelle's hotel ; he took the certificate home, and thinks he sent it to the president of the bank, through Mr. Arnold, but is not certain of it ; after this conversation with the clerk, he did not inform his father what had been done—not immediately ; he informed him of it in the course of three or four weeks ; his father found the mortgage was gone, and made inquiry about it, and witness informed him ; his father disapproved of the mortgage being recorded ; he never got the mortgage from the clerk ; his father told him he had better try and get the mortgage ; after the bond was signed, witness never took it out of his father's house ; at that time he knew it was not necessary to have a bond recorded ; previous to the signing of the bond and mortgage, witness had a conversation with some of the officers of the bank in reference to having a bond and mortgage executed ; these officers were the cashier and Mr. Bruen, one of the directors ; witness had made arrangements with them to give the bank a bond and mortgage, and take up certain notes which the bank held against his father ; the amount of the notes corresponded with the amount of the mortgage ; the notes were to be given up when the bond and mortgage were delivered to the bank ; there was no agreement as to the bond and mortgage being left there as collateral security ; witness never delivered the bond to the bank or any of its officers ; his father never authorized him so to do, unless the bank would give up the notes at the time it was delivered ; the bond and mortgage are in witness' handwriting. [Witness here desires

---

Commercial Bank v. Reckless.

---

to correct a previous part of his deposition, and now says the bond and mortgage were signed at or about the time they bear date; his father was sick a great deal about that time, and witness attended to his business generally.

On cross-examination, he says that his father, when he signed the bond and mortgage, was well aware of what he was doing; he knew the contents of them; witness took the mortgage to the clerk's office for the purpose of having a search made, and for that purpose only; he asked for a certificate that there was no encumbrance on the property described in the mortgage; he did not speak of it as his father's or mother's; the search was not made at his father's request, but at the request of the president of the bank; the president requested witness to have the search made; Mr. H. Bruen was president; witness said nothing to his father about having the search made; he does not think he told his father he had had a search made, till the conversation took place about the mortgage being recorded; he is not certain that in the conversation with the clerk, the clerk said the mortgage was probably recorded; he thinks the clerk said so; when he got the certificate he asked the clerk for the mortgage; the reason why he did not get the mortgage was because it was at the clerk's office, and he supposed that when he went home the arrangement with the bank might be carried out; the arrangement between his father and the bank, of which he speaks, was completed when he left the mortgage in the clerk's office; his objection to having the mortgage recorded was, he did not think it was his business to have it done; he intended to give it to the bank and get the notes, and let the bank have it recorded; after the mortgage was recorded it belonged to the bank, and he supposed they would give him the notes, as the mortgage was then in the clerk's office; he does not know how long the mortgage was in the clerk's office; he never sent or went for it; he does not know who got it from the office; he delivered the search, through Mr. Arnold, to the bank, because he wished the president of the bank to see it; he thinks neither the president nor any of the officers of the bank ever told him they were satisfied; the search was procured for the bank; after it was procured, and the mortgage left at the clerk's office, he had a con-



---

Commercial Bank v. Reckless.

---

versation with the cashier relative to the matter ; he told the cashier the mortgage was recorded in the clerk's office, and that he would like to give the bond to the bank and take up the notes ; the cashier said he would talk with the president about it ; it was some days before witness got an answer from the president, whether he would give up the notes or not ; the cashier said the president was unwilling to give up the notes, as the mortgage was intended only as collateral security ; witness told him that was not the understanding on his part ; he thought the bank intended to give up the notes ; he did not think it was right ; witness did not ask the cashier for the mortgage at the time ; he does not recollect asking any officer of the bank, at that, or any other time, for the mortgage ; he did not tell Mr. Nichols, or any other officer of the bank, at that, or any other time, that he would get the mortgage from the office ; he does not know why he did not at that time ask for the mortgage ; he considered it at that time as belonging to the bank ; before the bond and mortgage were signed, he took either them, or the ones from which they were copied, to the bank, for inspection ; he thinks they were left in possession of the bank two or three days ; he took a policy of insurance also to the bank, either at that or some other time ; he afterwards called for these papers, and the cashier, Mr. Nichols, gave them to him ; he took them home to his father's house ; a part of the arrangement between his father and the bank was, that a policy of insurance should be given on the mortgaged premises ; such a policy was made out by the North River Insurance Company of New York, for the amount mentioned in the mortgage ; it was shown to the bank and taken from them again ; he does not think it was ever given to the bank to keep ; he thinks, but is not certain, that it was shown to the bank about the time when the bond and mortgage were made ; at the time the mortgage was given, the bank was talking about commencing suits against his father ; he does not know that they had given his father notice of it ; he does not recollect that he was ever present at any conversation between his father and Mr. John Arnold, in reference to the notes ; when he left the mortgage with the clerk he did not notify him not to deliver it to any other person ; when he met the clerk in the street and asked

---

Commercial Bank v. Reckless.

---

him about the certificate and mortgage, the clerk had the certificate with him.

On re-examination on the part of the defendants, he says that, when he stated, in his cross-examination, that the arrangement was completed between his father and the bank, he meant nothing more than that the terms of the agreement were completed ; when he says he considered that the mortgage belonged to the bank, he does mean to say he thinks the bank ought to have it, but only that it legally belonged to the bank.

On further cross-examination, he says that, after he was told by the cashier that the bank would not give up the notes, he did not say to the cashier that he considered the transaction at an end.

James A. Nichols, the cashier of the bank, sworn on the part of the complainant, says that the notes in question were discounted at the bank, for the accommodation of Reckless ; they had been running for a considerable time ; the notes described in the bill are renewals of former notes ; he says that the mortgage was given as collateral security for the payment of the notes ; that Mrs. Reckless called on witness, and wished to know if the bank would not take a mortgage for \$3600, to secure the amount due on the notes, and until Mr. Reckless should be able to raise the money to take up the notes ; witness directed her to Mr. M. Bruen, that he might lay the proposal before the board of directors ; Mrs. Reckless met Mr. Bruen just below the banking-house ; and, subsequently, the board decided to take the mortgage ; at this time, the proposal was, that the mortgage should be given on the homestead, in Amboy ; afterwards, she proposed to give it on the property described in the mortgage ; witness knows that a bond was executed by J. W. Reckless, to the complainants ; he has seen it ; had it in his possession, as cashier of said bank ; it was given to witness, as such, by A. Reckless, son of J. W. Reckless ; witness has not the bond now in his possession, nor has the bank ; the bond and mortgage, and a policy of insurance on the property, were given together to witness, by said A. Reckless, at the bank, and as cashier of the same ; the papers above mentioned were all executed at the time of said delivery ; witness

---

Commercial Bank v. Reckless.

---

thinks he saw the mortgage before execution ; thinks the mortgage, or a rough draft of it, were presented to the bank before execution, to see whether it was correct, and the bank were satisfied with them ; after this, they were returned to A. Reckless by witness, for the purpose of having them recorded, and that the policy of insurance might be transferred to the bank ; the bond was handed over at the same time, witness being under the impression that it was necessary to record the bond as well as the mortgage ; the president directed that Mr. Reckless should be at the trouble and expense of recording the papers, as well as preparing them ; neither the witness nor the bank have ever had possession of the bond or policy, since ; the bank obtained possession of the mortgage from the clerk's office ; J. W. Reckless, at the time of the preparation and delivery of said papers, was confined to his house by sickness, during which, A. Reckless acted for him in this matter ; witness does not know that Mr. Reckless ever absolutely refused to return the bond ; witness sent to the clerk's office for the mortgage ; thinks the bank was about foreclosing, at that time ; it was a long while before it was sent for ; the bank did not pay the fees for recording, to the knowledge of witness ; witness, during the time the mortgage lay at the clerk's office, supposed the bond was there with it, not during the whole time, however, because he was informed it was not—was so informed by A. Reckless—up to which time, he supposed it to be with the mortgage, at the clerk's office ; the permission of the insurance company to transfer the policy to the bank, was obtained by Mr. Reckless, or some one for him ; the policy, at the time witness had it, had a blank assignment on it, not filled up, it being necessary to obtain the permission of the company, for this purpose ; the date of the said permission was March 15th, 1841, that of the policy being March 8th, 1841 ; witness obtained his knowledge of the fact of permission being granted, and the date thereof, from inspecting the books of the company, in New York ; witness did not see the policy in New York ; it was a part of the understanding, and a condition on which the mortgage was taken by the bank, that the property should be insured, and the policy assigned to the bank ; the bank never paid any premium for insuring the property ; Joseph W.



---

Commercial Bank v. Reckless.

---

Reckless and his wife, in February, 1841, gave another mortgage on the property then belonging to Mrs. R.; gave it to witness; a bond was given at the same time; both are now in witness' possession; witness had a conversation with Mr. Satterthwaite in regard to the mortgage mentioned in the bill; Mr. Satterthwaite, as trustee for Mr. Reckless and his wife, asked witness if the bank would wait and let the mortgage lie, provided he would pay up the back interest and pay the future interest as it became due; witness stated to him that there were other amounts due the bank from Mr. Reckless, and that witness thought it would be necessary to make some arrangement about that before the bank would consent to wait; Mr. Satterthwaite replied that he had nothing to do with any other debts; that he had only to treat about this mortgage; the conversation was in the street; it was commenced by Mr. Satterthwaite; he was then attending to some repairs about the property described in the mortgage; witness thinks it was in the summer before last (1842). [This conversation was objected to.]

On cross-examination, he says he got his mortgage recorded; he does not recollect whether he took it to the clerk's office himself, or sent it; rather thinks he sent it a few days after it was delivered to him, and before the papers for the bank were left with him; witness believes he sent both bond and mortgage to be recorded; thinks he got them from the office by sending an order for them; he never had taken a bond and mortgage from any person before that, either for himself or for the bank; he mentioned to the president of the bank that he had delivered the papers to A. Reckless; thinks the president told him to deliver the papers to A. Reckless for record; is satisfied he told the president he had delivered the papers to A. Reckless to be recorded, and the policy to be assigned; the president expressed no surprise that witness had delivered the bond; witness required no receipt from A. Reckless; he expected the policy to be returned as soon as it should be assigned; he made inquiry after the papers about three months afterwards, it might have been; made the first inquiry of A. Reckless; thinks the question was asked by some one of the directors, whether witness had re-obtained the papers; witness remained perfectly easy, during these three months, in relation

---

Commercial Bank v. Reckless.

---

to the papers, because he presumed that the bond and mortgage were at the clerk's office, and the policy at the office in New York ; A. Reckless was to return the policy to witness ; when A. Reckless took the bond with the mortgage for record, he did not say he wanted the bond for record, but witness thought it was necessary ; a search was made previous to executing the mortgage ; he thinks he informed the complainants' solicitor as to the means by which A. Reckless obtained the bond, in order to enable him to draw the bill ; A. Reckless, at the time of the negotiation, lived with his father, in Amboy ; he left soon after, for Monmouth ; the first time he saw him after his return from Monmouth, witness conversed with him respecting the papers, witness introduced the subject ; he thinks the complainants' solicitor read the bill of complaint to him, the witness ; as witness recollected them at that time, the facts stated therein were correct ; Mr. Reckless, during this transaction, was in embarrassed circumstances ; the directors felt uneasy respecting some of these debts ; they were desirous to secure them ; he has understood that the property embraced in the mortgage formerly belonged to John Patrick, the first husband of Mrs. Reckless ; he first discovered it was unnecessary to record a bond in New Jersey, from Mr. Paterson.

Being re-examined-in-chief, he says time was given to Mr. Reckless, and the mortgage in question taken, in order that Mr. Reckless might be enabled to raise the money, Mrs. R. then stating that to sell the property at that time would be a great sacrifice ; the property of Mr. Reckless was considered by the officers of the bank, at the time of executing this bond and mortgage, sufficient to pay all his debts ; the understanding of the bank and Mr. Reckless was that the bank should retain the notes also, and that the bond and mortgage were taken as collateral security ; thinks the bank would not have consented to take the bond and mortgage in lieu of the notes ; he never would have re-delivered the papers to A. Reckless unless under the supposition that they would be returned in good faith ; he had at that time every disposition to believe that the agreement would be carried out and the papers returned in good faith ; on satisfaction of this mortgage, witness, as cashier, would have delivered up the notes to Mr. Reckless.

Being again cross-examined, he says that, when he says that the property of Mr. Reckless was considered, at the time of executing this bond and mortgage, sufficient to pay all J. W. Reckless' debts, he means all his property, as well derived from his wife as otherwise.

Matthias Bruen, sworn for complainants, says that, while walking in the street, at Amboy, about the time of the giving the bond and mortgage in question, he was met by Mrs. Reckless, who said she had just been conversing with Mr. Nichols, who had referred her to witness; he asked her what her object was; she replied that they had had notice that the notes held by the bank against Mr. Reckless were to be put in suit; witness said it was so; that they had been running a long time, and that the directors had resolved to bring the business to a close; she appeared to be in great trouble, and said she hoped witness would not press the thing; he answered that the board had no desire to do anything unreasonable; to which she said she would secure the claim of the bank; witness asked her in what way; she answered, by giving a mortgage on her own property, or property that once was hers; witness said he understood the property then belonged to her husband; that she had made it over to John Reckless, and he to his father, of same date; witness then said he would lay the case before the board; that he was but one of the board; and they would determine what to do; he did lay the circumstances before the board, at their next meeting, and they agreed to take a bond and mortgage as collateral security for the notes due, and to suspend prosecution on the notes; he had a conversation with A. Reckless; he told witness he would have all the papers executed, and would leave them with the cashier; at the time of this conversation, Mrs. Reckless proposed to give a mortgage on the homestead, which the bank preferred; but Mrs. Reckless afterwards asked the bank to take the mortgage on the premises described in the mortgage; the bank, at first, did not think favorably of the proposal to take any mortgage, thinking the notes had been too long running, and witness himself was opposed to it; but Mrs. Reckless appealed to his feelings and wept, and he consented, and so did the bank, to accommodate her and her husband; at the time the bank acceded to the



---

Commercial Bank v. Reckless.

---

proposal, it was understood expressly that the notes were to be retained by the bank ; and the bond and mortgage were as additional security ; such was the understanding, not only of Mr. Reckless and wife, but also of some of the endorsers on the notes ; the bond and mortgage would not have been accepted if the condition had been that the notes were to be given up.

On cross-examination, he says he is not a stockholder in the bank ; that he parted with his stock on the Wednesday or Thursday before the day of his examination ; he says it is very likely he parted with it in order to be a witness in the cause, but does not say positively ; that he has no interest in that stock at present ; his interest in the stock was somewhere about 1500 shares ; that he is not a director ; that he resigned his office as such a few days before his examination.

Nicholas Booraem, sworn for the complainants, says he is, and was on the 24th March, 1841, clerk of Middlesex ; being shown the mortgage, he says the endorsement of registry on it is in his handwriting ; he does not recollect who left the mortgage with him ; but, from the endorsement on it, he knows it came into the office on the 24th March, 1841 ; he supposes it was brought to the office for record, or he should not have recorded it ; he does not remember that it was brought to the office by A. Reckless ; cannot say who brought it ; he has no recollection that A. Reckless ever asked him for a certificate of encumbrances on the property mentioned in the mortgage, or any other property of J. W. Reckless ; it is not usual for him to carry in his pocket certificates of search that he has made. Unless requested otherwise, he leaves them in the office to be called for ; he does not remember how long the mortgage remained in the office after it was recorded, nor does he know how it was taken out ; he is under the impression that he sent the mortgage to the cashier of the Commercial Bank, at his request expressed in a letter ; yet he may be mistaken, as the cashier had a mortgage of his own in the office about the same time, given to him by the same parties who executed the mortgage to the bank ; he does not know who paid for recording the mortgage to the bank ; he should not have recorded the mortgage unless he had understood, at the time it was left in the office, that it was to be recorded ; he does not remember

---

Commercial Bank v. Reckless.

---

that he was ever notified not to deliver the mortgage to the bank; if he had received such a notice, he should not have delivered it without an investigation.

A certificate of the secretary of the North River Insurance Company, that on the 15th March, 1841, consent was given by that company for the assignment of the policy to the Commercial Bank, was admitted in evidence.

It was also agreed by and between the solicitors that certain judgments obtained by the complainants against J. W. Reckless, in the Supreme Court, in November, 1842—one for \$4029, and the other for \$1014—be admitted in evidence for the defendants; and that the deposition of Anthony Reckless, though not closed, be admitted and read in evidence.

*P. D. Vroom*, for the complainants.

*J. Van Dyke*, for the defendants. He cited *Saxton's Ch.* 458; 10 *John. R.* 524, 540, 542, 545.

**THE CHANCELLOR.** The ground taken by the bill is shortly this: that the bond and mortgage were given as collateral security for the notes; that there was an absolute and final delivery of the bond and mortgage to the bank, in completion of an agreement to give them as collateral security for the notes; that after such delivery, J. W. Reckless, or some person for him and in his name and by his authority, under the plea or pretense of procuring the assignment to the complainants of a policy of insurance on the premises, and the assent of the insurance company to that assignment, procured the bond and mortgage from the complainants, with the full understanding and belief of the complainants that they were to be returned to the complainants when the object for which they were taken was accomplished; that the mortgage was returned to the complainants, but that J. W. Reckless, at all times thereafter, refused to deliver up the bond to the complainants.

From this statement we should conclude that the matter of insurance, and of the assignment of the policy to the complainants, were no part of the arrangement contemplated by the parties; that the bond and mortgage had been delivered to

---

Commercial Bank v. Reckless.

---

and received by the complainants absolutely and finally ; that the transaction as contemplated was completed ; and that J. W. Reckless, or some person for him, by a pretence, cheated the bank out of the possession of the bond and mortgage, and afterwards returned the mortgage to the bank, but refused to deliver up the bond to them. The cashier of the bank, sworn as a witness for the complainants, says that the complainants' solicitor read the bill of complaint to him, and that, as he recollected them at that time, the facts therein stated were correct.

The testimony of the cashier is the only evidence produced in support of the allegation in the bill of the delivery of the bond and mortgage ; and if it stood uncontradicted, it would be very meagre evidence of a delivery of the papers, in the legal sense of the word, and in the sense in which the word is used in the bill, even by the son, and much more insufficient evidence of such a delivery by the authority of the grantors. The statement made by the cashier in his testimony, is essentially variant from the case made by the bill, and the effect of this variance is not avoided by his saying, in his testimony, that the facts stated in the bill were correct, as he recollected them at the time the complainants' solicitor read the bill to him. Instead of an absolute delivery of the bond and mortgage, and the subsequent obtaining of the possession of them by the mortgagor, or his son, on a pretence, and the return of the mortgage to the complainants, which is the case made by the bill, the cashier, when sworn in the cause, shows that it was a part of the understanding, and a condition on which the mortgage was to be taken by the bank, that the property should be insured and the policy assigned to the bank ; that the papers were returned by him, the cashier, to Anthony Reckless, for the purpose of having them recorded and that the policy of insurance might be transferred to the bank ; that the president of the bank directed that J. W. Reckless should be at the trouble and expense of recording the papers as well as preparing them ; and that the bank afterwards obtained possession of the mortgage from the clerk's office, without asking the consent of the mortgagors, or either of them, or any person acting for them, J. W. Reckless having possession of the bond, and he, or his son acting for him, having long before refused to deliver the bond.



---

Commercial Bank v. Reckless.

---

This is a remarkable failure of testimony to support the case made by the bill. And if we could give to this testimony all the weight it would be entitled to if the bill (prepared on advisement with this witness as to the facts, as he himself states,) had stated the facts as they are stated by the cashier in his testimony, the testimony is insufficient to show a completion of the arrangement and a delivery of the papers thereupon. If the papers were ever in the cashier's hands after they were executed, they were incomplete, according to the cashier's own account of what the arrangement was; the policy had not been transferred; and all the papers were handed back to A. Reckless for the purpose of having them completed, by the procurement by the mortgagor of a transfer to the bank of the policy of insurance, and, the cashier says, to be recorded; the president having directed that J. W. Reckless should be at the trouble and expense of recording the papers.

It seems to me it would be to indulge in great latitude in aid of the bank, the complainants in the cause, and who are, therefore, to make out their case affirmatively, to say that, notwithstanding the papers were so handed back to A. Reckless for such purpose, and with such directions, the previous possession of the papers by the cashier is now to be considered as a possession on an absolute and final delivery.

Again, whether the arrangement was that the bond and mortgage were to be substituted for the notes, or were to be merely collateral security, it was an arrangement which J. W. Reckless might make or decline to make at his pleasure, and on such terms as he pleased. And if the papers were handed back to him, with a requirement that he should have them, or the mortgage, recorded at his own expense, he was at perfect liberty to decline doing so, and to refuse to deliver the papers. Nay, if he had afterwards sent the mortgage to the clerk's office to be recorded, yet, unless he left it with the clerk with such directions as would amount to a delivery to the bank, he could, at any time take back the mortgage from the clerk and refuse to deliver the papers, either with or without reason. The arrangement contemplated was purely voluntary on his part.

The case made by the bill is not sustained. And the facts

---

Commercial Bank v. Reckless.

---

stated by the cashier in his testimony, are not sufficient, in my judgment, to show a delivery.

But if a delivery could be affirmed by the court on the testimony of the cashier uncontradicted, it is but the testimony of a single witness, in opposition to the positive denial of the answer. And, so far from finding circumstances equivalent to another witness, in corroboration of the allegation of delivery, the circumstances, and the general features and outline of the case, are strongly in corroboration of the answer. And, beyond this, the testimony of the cashier, if he means to say there was a delivery, in the legal sense of that word in this respect, is contradicted by the very person who, the cashier says, gave the papers to him, and to whom he returned them.

It was said on the argument on the part of the complainants, that there were discrepancies between the answer of the defendant and the testimony of A. Reckless; and the court was asked, for that reason, to disregard the answer altogether, and to give no weight to its denial of delivery. I see no greater discrepancies between the answer and the testimony of A. Reckless than there are between the bill and the testimony of the cashier. Besides, discrepancies in incidental matters between the answer and a witness called to support it, cannot overcome the denial of the answer of the material allegation of the bill. And in this case, the material allegation of the bill denied by the answer, that is to say, the delivery, is contradicted by the witness called in support of the answer, the person who is alleged to have made the delivery, and thus the denial of the delivery made in the answer is supported. The zeal of counsel might prompt the idea that both the answer and the witness in support of it should be disregarded in this case; but the court cannot see anything in the case to call for such a sacrifice, much less to make such a sacrifice on the testimony of a single witness for the complainants, giving, in his testimony, an essentially different version of the case from that given in the bill drawn under his advisement as to the facts. I know of no reason for giving to the testimony of a witness standing in the position of this witness, any more potency than is allowed to the testimony of any other single witness in opposition to an answer. But, in this case, the court is asked to break down, not only the answer,

---

Commercial Bank v. Reckless.

---

but the testimony of a witness in full support of it, on the single testimony of the cashier of the bank. I do not see that the complainants can reasonably expect this.

Next, the bank allege, in their bill, that the bond and mortgage were to be given as collateral security for the notes, and, as the case stands, it would be necessary for the bank to sustain this position affirmatively, if they could have prevailed on the other point.

Now, the recital of the mortgage is as follows: "Whereas, Joseph W. Reckless, of the first part, is justly indebted to the said party of the second part, in the sum of three thousand six hundred dollars, secured to be paid by a certain bond or obligation, bearing even date with these presents, in the penal sum, &c., conditioned for the payment of the said first-mentioned sum of three thousand six hundred dollars, on or before the 5th day of March, which will be in the year of our Lord 1842, with lawful interest from the date thereof, to be paid half yearly," &c. The bond and mortgage were dated March 5th, 1841. An absolute bond, then, was drawn for three thousand six hundred dollars, and a mortgage to secure the bond. Nothing was said about the notes, or that the bond and mortgage were merely additional security, either in the bond or in the mortgage.

There was no obligation resting on Reckless to give a bond and mortgage, at all. The bank had the notes and endorsements on which they loaned their money; and no object or motive can be perceived to induce Reckless to give a bond and mortgage for the amount due on the notes, except that of relieving his endorsers, by taking up the notes. It is hardly conceivable that Reckless would be willing to give an absolute bond and mortgage for three thousand six hundred dollars, full and complete evidence of indebtedness to that amount, beyond the amount of the notes, and leave the notes with the bank, and subject himself to the hazard of proving or failing to prove that they were for the same debt. No prudent man would do so, in a transaction with an individual; and we are not to presume that Reckless, or any other person, would have more confidence in a corporation than in an individual.

With these remarks in view, we shall not be surprised to find that the effort on the part of the bank to sustain the position



---

Commercial Bank v. Reckless.

---

they take on this part of the case, is weak, and the testimony on which they rely, entirely unsatisfactory.

The bill, after stating the notes, says that, for the better securing the same, and as collateral security therefor, J. W. Reckless executed his bond for three thousand six hundred dollars, the amount of said notes, and the mortgage in question, to secure the bond; and the bill says the complainants insist that, "as the mortgage was given as security for the payment of the notes, their right in such security is good and perfect, independently of the bond, which was not the evidence of the debt, but merely designated the amount for which security was given."

The testimony on the part of the complainants may be sufficient to show that the bank intended to get the bond and mortgage, and retain the notes, too, but it is insufficient to show that Mrs. Reckless consented to such an arrangement, and still more insufficient to show that J. W. Reckless consented to it. The two portions of the testimony relied on by the complainants to show that Mrs. Reckless consented to such an arrangement, are as follows: The cashier says that Mrs. Reckless called on him, and wished to know if the bank would not take a mortgage to secure the amount due on the notes, and until Mr. Reckless should be able to raise the money to take up the notes. Does the cashier mean to say that the last clause, "to take up the notes," was the language of Mrs. Reckless? And if it was, and the whole sentence together, is to be taken, from the language of a woman in distress, to mean that a bond and mortgage were to be given as collateral security for the notes, yet the bond and mortgage were not so drawn, and there is nothing to show that she consented to the delivery of an absolute bond and mortgage, making no reference to the notes. Matthias Bruen, in his testimony, says that Mrs. Reckless, in her conversation with him, appeared to be in great distress, and said that she would secure the *claim* of the bank. These are the only two clauses in the testimony on which the allegation of the complainants, that the bank were to have this absolute bond and mortgage, and retain the notes, too, and that Mrs. Reckless consented to it, rests. Their insufficiency for such a purpose is, it seems to me, apparent.

---

Commercial Bank v. Reckless.

---

But what is the testimony relied on to show that J. W. Reckless ever consented to such an arrangement? It is as follows: The cashier says the understanding of the bank and Mr. Reckless was, that the bank should retain the notes also, and that the bond and mortgage were taken as collateral security. Where did the cashier get his authority for saying that it was the understanding of Mr. Reckless that the bank should retain the notes? Mr. Reckless was confined to his house by sickness during the whole period of the negotiation, and until it was broken off, and it is not pretended that the cashier saw him within that period. Matthias Bruen, in his testimony, says that at the time the bank acceded to the proposal, it was understood expressly that the notes were to be retained by the bank, and the bond and mortgage were as additional security. By whom was it so understood? This witness has before said that Mrs. Reckless proposed to him that she would secure the claim of the bank, that he told her he would lay the case before the board; that he did so, at their next meeting, and they agreed to take a bond and mortgage as collateral security for the notes. It is apparent that, thus far, the witness says nothing more than that when Mrs. R.'s proposal to *secure the claim* of the bank was laid before the board, *the board* agreed to take a bond and mortgage as collateral security for the notes. There was nothing in the nature or language of Mrs. R.'s proposal to bind her, even if she had been a single woman, by the agreement of the directors among themselves, to take a bond and mortgage as collateral. That was not the proposal of Mrs. Reckless. The witness then proceeds with this general remark: "Such was the understanding, not only of Mr. Reckless and wife, but also of some of the endorsers on the notes." Now, considering the confinement of Mr. Reckless by sickness, and that it does not appear that this witness ever spoke with Mr. Reckless on the subject, it is asking too much to ask the court to decree on such testimony, (it relating, too, to a time prior to the drawing of the mortgage,) that Reckless consented to deliver, and did deliver, an absolute bond and mortgage, making no reference to the notes, and consented also to leave the notes and the endorsements thereon with the bank.

But again, if such could have been the original understand-

---

Commercial Bank v. Reckless.

---

ing of J. W. Reckless, before the papers were drawn, yet he was under no obligation to carry out such an arrangement. It will not be contended that a bill would be sustainable to compel the performance of such an agreement, and the mortgage, when afterwards drawn, being drawn simply to secure a bond mentioned therein, J. W. Reckless not only had the right to say, but a regard for his own interest required him to say, that the bond and mortgage, as drawn, should not be delivered unless the notes were given up. And J. W. Reckless being sick, and his son attending to his business for him, it was the duty of the son to refuse to deliver the said bond and mortgage unless the notes were given up; and he swears he did so refuse, and I can see no reason for doubting it. It was his duty to refuse unless otherwise directed by his father, and of this there is no proof. And yet, in a case in which the complainants must have been well aware that a delivery of the papers could not have been compelled by the court, the court is asked to decree, on the evidence in this cause, that the papers were actually delivered; and that the mortgage, taken by the complainants from the clerk's office, long after the refusal of the son, acting for his father, to deliver the bond, (the bond, the principal instrument, being still in the possession of J. W. Reckless,) shall be decreed to be a valid security, independent of the bond. I venture to say that no such decree was ever before asked on such testimony as is presented to the court in this case.

It seems there were other debts due from J. W. Reckless to the bank, besides the amount secured by these notes with endorsers. This may account for the desire of the bank to get the bond and mortgage in the shape in which they were, and retain the notes.

It was said in the argument that the possession of the mortgage was presumptive evidence of its delivery. Whether the possession of a mortgage given to secure a bond, the bond remaining in the possession of the obligor, and he refusing to deliver it, would be any evidence of the delivery of the mortgage, is a question which it is not necessary to consider in this case. The possession of a deed by the grantee named therein, and the possession of a bond and mortgage by the obligee and



---

Commercial Bank v. Reckless.

---

mortgagee, would be *prima facie* evidence of due delivery. But I am unable to perceive that the possession of a mortgage obtained from the clerk's office, without the consent of the mortgagor, and after he had refused to deliver the bond to secure which the mortgage was drawn, has any potency whatever, or is entitled to any consideration as evidence of a due delivery of the mortgage. The rule, that possession is presumptive evidence of delivery, has no application to such a state of things. If it be asked why J. W. Reckless left the mortgage so long at the clerk's office, the answer is plain. He had possession of the bond, the principal instrument; and had, as the bill states, and as A. Reckless, who attended to this business for J. W. Reckless, testifies, refused to deliver it. Could it be imagined that, under such circumstances, the bank, or their cashier, would send to the clerk's office and get the mortgage? But I think it may be asked, with much more significancy, why the bank pursued the course they did. After the refusal to deliver the bond, a long time, the cashier says in one place, three months he says in another place, elapsed before he sent to the clerk's office for the mortgage. The bank certainly could not have expected that possession of the mortgage so obtained, after the refusal to deliver the bond, would be sufficient evidence of the delivery of the mortgage. And that they did not so expect, the bill itself shows.

The bill says nothing of their getting the mortgage from the clerk's office, but says the mortgage was returned to the complainants; and the bill is framed entirely on the charge that both bond and mortgage had once been delivered, absolutely, and that they were afterwards obtained from the bank on a pretence, and that Reckless afterwards refused to deliver up the bond. It has been before shown that the case made by the bill is not sustained. And the bank themselves seem to have had little confidence in the ground which, at a very late period, they assumed in the bill. They prosecuted the notes, obtained judgment, and caused execution to be issued and to be levied on these very premises. It was said in argument, on the part of the defendants, and not denied, that it happened that another execution, issued on a judgment obtained by another creditor of J. W. Reckless, was recorded an hour or so before the

---

Commercial Bank v. Reckless.

---

execution in favor of the bank. The cause was argued for the defendants by counsel in behalf of a judgment creditor other than the bank, which shows that his execution was ahead of that of the bank. It was not till after this state of things occurred, that the bank filed their bill in this cause. It seems to me that the course pursued by the bank betrays an evident want of confidence in the idea that there had been a delivery of the bond and mortgage, or that their obtaining the mortgage from the clerk's office would help their case. And this want of confidence is apparent in the bill, and in the testimony of the cashier and Mr. Bruen.

The fact that the mortgage was recorded cannot, under the circumstances of this case, aid the complainants. To constitute a delivery, even of a deed, a single instrument having no connection with any other, the grantor must part, not only with the possession, but with the control of the deed, and deprive himself of the right to recall it. *Dev. Eq.* 14; *C. W. Dud. Eq.* 14.

If a deed be left by the grantor for registry, the mere registration is not equivalent to a delivery. To make the leaving a deed, by a grantor, with the clerk for registry, a good delivery to the grantee, it must be left by the grantor, or by his authority, for the grantee. *Rice's Eq.* 244.

If, then, the mortgage was left with the clerk, by J. W. Reckless, or by his authority, for the express purpose of being recorded, which is denied both by the answer and by the testimony of A. Reckless, who handed the mortgage to the clerk, yet there is no evidence that the grantor left it, or authorized it to be left with the clerk for the grantees, and that the grantor intended to part with the control of it.

Delivery is essential to a deed; and as the mortgage was taken from the clerk's office by the bank, or by the cashier for them, it is for the complainants to prove that it was left with the clerk in such manner and with such directions from the grantor as to amount to a delivery to them, or for their benefit, and authorize them to take it from the clerk. 5 *Mason's C. C. R.* 60. There is no such evidence.

It will not be claimed that J. W. Reckless could not have taken the mortgage from the clerk's office. Were any such di-

---

Commercial Bank v. Reckless.

---

rections given to the clerk, when the mortgage was left with him, as would authorize him to refuse to return it to the person who gave it to him, or to J. W. Reckless? Certainly not. And the bond, to secure which the mortgage was drawn, was, when the mortgage was handed to the clerk, in the possession of J. W. Reckless or his agent, and delivery of the bond was afterwards refused, and refused before the bank sent to the clerk's office for the mortgage. And in a case like this, the bank could acquire no right whatever to or in the bond and mortgage until an absolute and final delivery of them. J. W. Reckless or his wife might object at the last moment to deliver them either with or without a reason; and if they ever were willing that the bond and mortgage as drawn, should be delivered and the bank retain the notes, they were at liberty to change their mind at any time before the completion of the arrangement by a final delivery of the papers, and to refuse to deliver them. There was no consideration binding them, or obligation resting upon them, either to substitute the bond and mortgage for the notes, or to give them as additional security for the notes. It was a matter resting simply in their will, and they could change that will at the last moment. I do not see that it is possible that the registry of the mortgage, under such circumstances, can afford the least aid to the complainants.

It is not a case of money advanced on securities claimed to have been delivered. The bank have still the securities on which they lent their money. They sustain no loss by not being able to avail themselves of this bond and mortgage; they simply fail to obtain additional or substituted securities for a loan previously made on securities good, or thought by them to be good, when the loan was made.

It is unnecessary for me to make any observations as to the admissibility of the testimony of Mr. M. Bruen, or any animadversions upon it, or on the position in which his cross-examination places him. Taking his testimony as it is, the case, in my judgment, is clearly with the defendants. The bill must be dismissed.

Decree accordingly.



---

Mayne v. Baldwin.

---

THE STATE, EX RELATIONE JOHN MAYNE, v. HENRY  
BALDWIN.

An infant daughter ordered to be delivered to her father, on a *habeas corpus* applied for by him, though he had verbally committed her to the care and custody of the respondent until she should attain the age of twenty-one, and the respondent had adopted her accordingly.

On the petition of John Mayne, the relator, in his right as father, the Chancellor allowed a writ of *habeas corpus ad subjiciendum*, directed to Henry Baldwin, commanding him to bring before the Chancellor Anna Mayne, an infant child of the relator; the said child being, as alleged, illegally detained and withheld from the relator's custody by the said Baldwin, with the cause of her detention.

Baldwin, in obedience to the writ, produced the child, and the return to the writ states the cause of detention thus: "On the 20th July, 1844, Anna Mayne, in the within suit named, was committed to me by John Mayne, said to be the father of the said Anna, to be by me kept and adopted until she arrive at full age, and was by me adopted accordingly by the request and consent of said Mayne."

At the time of the allowance of the writ, the child was of the age of five years and seven months, and it appeared that, about sixteen months before, the child had been taken by Baldwin, with the verbal consent of the relator, to be adopted by Baldwin and brought up as his own child until she should be of full age.

No deed or writing of any kind was ever executed by the relator or Baldwin, in relation to the custody or services of the child, or the terms on which Baldwin was to keep and bring her up.

The relator had demanded of Baldwin the custody of the child and was refused it.

*J. P. Bradley*, for the relator. He cited 8 *Paige* 47, 678; 25 *Wend.* 64; 3 *Hill* 399; 2 *Story's Eq.*, § 1343; 2 *Swanst.* 553, 557, 559; *Vaughan* 177, 180; *Elm. Dig.* 598; 1 *Barn. and Ald.* 723; 1 *Harr.* 419.

---

Mayne v. Baldwin.

---

*S. R. Grover* and *L. C. Grover*, for the respondent. They cited 2 *South.* 445; 10 *Johns. Rep.* 605; 4 *Cowen* 728; 3 *Burr.* 1437; 8 *Johns. Rep.* 253; 4 *Dall.* 347.

THE CHANCELLOR. A father is entitled to the custody of his minor children, as guardian by nature, and guardian for nurture. 3 *P. Wms.* 154; 5 *East* 221. Such guardianship is not assignable. 2 *Swanst.* 567, 571. The care and custody of minor children is a personal trust in the father, and he has no general power to dispose of them to another. 3 *Hill's Rep.* 410, 411.

The verbal agreement set up in this case is void as a contract for the apprenticeship of the child, by our act respecting apprentices and servants.

From these principles it follows that the respondent has no right to detain this child from the custody of its father.

In this case, the child is of such tender years that the father could properly apply for the writ of *habeas corpus* in his own right, without the privity of the child; and it is a case in which, for want of discretion in the child, it is proper that, instead of merely delivering the child from improper restraint, an order should be made for the delivery of the child to the father. 3 *Hill* 399.

Order accordingly.

CITED in *State v. Baird*, 3 *C. E. Gr.* 199.

# PREROGATIVE COURT.

JUNE TERM, 1846.

---

## IN THE MATTER OF THE PROBATE OF A PARCHMENT WRITING, PURPORTING TO BE THE LAST WILL AND TESTAMENT OF PAMELA JOLLY, DECEASED.

A writing, purporting to be executed by P. J., by a mark, which writing, with the names of all the persons whose names were subscribed as witnesses, and the name of P. J., were in the handwriting of one of the persons whose name was subscribed as a witness, not admitted to probate on proof that the signature of the person who wrote the will and signatures was her handwriting, and that she was dead.

---

On the 7th July, 1843, a parchment writing, bearing date and purporting to have been executed May 20th, 1824, purporting to be the last will and testament of Pamela Jolly, deceased, which had been exhibited for probate in the surrogate's office of Burlington, and against the probate of which a *caveat* had been filed, was declared by the Orphans' Court of that county to be sufficiently proved, and the said court accordingly decreed that letters testamentary issue thereupon, directed to the executrix therein named. From this decree an appeal was taken to this court.

It appeared from the testimony, and from inspection, that the writing offered as a will, the body of it and the names purporting to be the names of witnesses to it and the name "Pamela Jolly" are all *in one handwriting*, and that not the writing of Pamela Jolly.



## The Will of Pamela Jolly.

The writing offered for probaté purports to have been executed thus, "Pamela  $\overset{\text{her}}{\times}$  Jolly," and purports to have been subscribed by John Oliver, Joshua Carman, and Elizabeth Carman, as witnesses.

It appeared by the testimony, that John Oliver died previous to May 11th, 1824, his will having been proved on that day; that the name "John Oliver," subscribed as a witness to the writing offered for probate, was not his handwriting; that the name "Joshua Carman," subscribed as a witness to said writing, was not his handwriting; and that the whole of the writing, signatures and all, was in the handwriting of Elizabeth Carman, including her name as a witness to the said writing. Joshua Carman died A. D. 1838, and Elizabeth Carman died A. D. 1837.

A letter, claimed to have been written by Pamela Jolly, dated A. D. 1831, referring to a will of Pamela Jolly theretofore made, and saying that such will theretofore made was written by John Oliver, was admitted in evidence in the Orphans' Court; but it appeared in evidence that the writing offered for probate was not written by John Oliver. No proof was adduced to show where the writing was found.

*H. W. Green*, for the appellant.

*R. D. Spencer* and *P. D. Vroom*, for the respondent. They cited *Phil. Evid.* 473, 501; 1 *Stark. Evid.* 341; 5 *Halst.* 573; 2 *South.* 450; 4 *Halst.* 329.

**THE CHANCELLOR.** If the letter admitted in evidence by the Orphans' Court be genuine, it proves that Pamela Jolly had made a will before 1831, the date of the letter. But it is clear, from the testimony, that the writing now offered as a will, is not the will referred to in that letter. The letter says that the will referred to in it was written by John Oliver. The testimony shows that the writing offered as a will was not written by John Oliver. It is clear, also, from the testimony and from inspection, that the writing offered as a will, the body of it, and the names purporting to be the names of witnesses to it, are

---

The Will of Pamela Jolly.

---

all in *one handwriting*; and that not the writing of Pamela Jolly. The writing, then, cannot be what it purports on its face to be—a will signed or executed by mark, in the presence of the witnesses whose names appear to it as witnesses. If it can be held to be a will, it must be on some ground different from what the face of the writing purports.

The writing bears date May 20th, 1824. The letter referring to a will written by John Oliver, is dated in 1831. It was suggested by counsel for the probate, that the writing offered for probate was not made till after 1831, but that it might be a will notwithstanding; that, though the body of the writing and the signatures are in one handwriting, yet if there is satisfactory testimony that Pamela Jolly signed it after 1831, it would be a good will of personal property. Is there such evidence? The will purports to be executed by a mark. A writing purporting to be executed by a mark, without any proof where it was found, or any proof of any distinctive character in the mark, and without a witness of its execution, or what is equivalent to it, cannot be received as a will.

But it is said that the body of the writing, and the signatures to it, are all in the handwriting of Elizabeth Carman; that, therefore, the name of Elizabeth Carman, appearing as the name of a witness, is a genuine signature; and that she, being dead, proof of her handwriting proves the execution of the will. It may be that, after 1831, Pamela Jolly may have proposed to make a new will, and she and Elizabeth Carman, or she alone, may have supposed it would be sufficient to have a copy of the old will, date, and names made, introducing any alterations she might wish, and to execute it. And if she did so execute it, and the court have the legal evidence of its execution, it would be a good will of personal property. But there is a link wanting in the testimony. No proof of execution is to be derived from the name of "Pamela Jolly" in this case.

If Elizabeth Carman were in life, and had been produced as a witness, and had sworn that she saw Pamela Jolly execute the writing by making her mark, and that she subscribed her name as a witness to such execution, it would have been sufficient proof; or, if there had been added to the writing, as it

---

The Will of Pamela Jolly.

---

now stands, a new attestation clause, showing that it was executed in the presence of Elizabeth Carman, and her name, proved to be genuine, was subscribed thereto ; proof of that signature, she being dead, might have been sufficient.

But as the writing now stands, and under the facts proved, and on the very supposition that brings us to the present point of inquiry, there is nothing in the mere signature of Elizabeth Carman, as it now appears on the writing, which can amount to an affirmation or supposed affirmation by Elizabeth Carman, or to any intendment in law, that she saw Pamela Jolly execute this writing.

For aught that appears, or that can properly be inferred from the face of the paper and the proofs, Elizabeth Carman may simply have made a copy of the old will, including the signatures, (this is the supposition of the counsel for the probate,) and handed it to Pamela Jolly, and she may have put her mark to it alone in her chamber, or some one else may have put her mark to it. But if she did it herself, it must be proved she did it. We are not at liberty to carry the supposition so far as to make Elizabeth Carman's name say what it is admitted neither of the other names subscribed as witnesses says, and what the mere appearance of her name with the other names appearing as the names of witnesses, cannot by any intendment, under the circumstances, make her say.

The proof adduced for the probate was insufficient, and the decree of the Orphans' Court will be reversed.



# CASES IN CHANCERY.

SEPTEMBER TERM, 1846.

---

JOHN I. PLUME v. GEORGE D. SMALL.

1. The conditions of sale for the sale of lands and buildings provided for the sale of the buildings separately: and one of the conditions of the sale was as follows: "The buildings will be sold, to be removed, within thirty days from this date, from the premises." *Held*, that the purchaser of a building, who also purchased the lot on which it stood, was not bound to remove the building.

2. The court cannot act on a distinct ground for relief made by the proofs, if it be not set up in the bill.

---

The facts of this case sufficiently appear in the opinion of the court.

*A. Gifford and Wm. Halsted*, for complainant.

*A. C. M. Pennington*, for the defendant.

THE CHANCELLOR. George D. Small, being the owner of a piece of land on the corner of Broad and Fulton streets, in Newark, of 106 feet on Broad and 300 feet on Fulton street, an agreement was entered into between certain persons, of whom the complainant was one, and Small, by which the property was to be taken at a valuation of \$28,000, in shares of \$1000, or half shares of \$500 each, Small retaining an interest therein to the amount of five shares; the property to be advertised and sold at such time, in such manner, and on such

---

Plume v. Small.

---

terms, as the owners of a majority of the shares should direct ; the deeds to be given by Small and wife to the purchasers at such sale ; ten per cent. to be paid to Small at the signing of the agreement, and twenty per cent. on the delivery of the deeds ; and the residue out of the cash and securities received from the purchasers. All the shares being subscribed for except the five retained by Small, he also subscribed the agreement. The manner and conditions of sale were fixed, and the sale advertised for May 21st, 1836. The property was divided into building lots, and the buildings on the property were to be sold separately, the third article of the conditions of sale being as follows : " The buildings will be sold, to be removed within thirty days from this date, from the premises." The fifth article of the conditions of sale was as follows : " If any purchaser shall refuse to take the property bid off by him, it shall immediately be put up and resold, and if it shall sell for more, he shall not receive the benefit thereof ; but if it sell for less, he shall make good the deficiency." The seventh article provided that the deeds would be ready for delivery by Ambrose Williams, (one of a committee of the associates,) at an office named in the article, on the Saturday after the sale. The eighth article provided that each purchaser, before he left the place of sale, should subscribe the articles of sale. The buildings on the property were a building called Cadet Hall, on the corner, the main house on Broad street, a building on the south of the main house, and a barn on Fulton street. The land was divided into eleven lots ; the first seven lots, numbered from 1 to 7, inclusive, were on Fulton street, No. 8 was the corner lot, Nos. 9, 10 and 11 were the next adjoining lots in order on Broad street ; the main house stood on lot 10 and part of lot 9, and the buildings south of the main house stood on lot No. 11. On the day fixed for the sale, the conditions of sale were first read, and each of the eleven lots was cried and struck off separately, and each of the buildings, designated as before mentioned, was cried and struck off separately. Lot No. 11, of thirty-one feet front, was struck off to Small at \$179 per front foot ; lot No. 10, of twenty-five feet front, next adjoining it on the north, was struck off to Ambrose Williams, one of the subscribers, and one of a committee of three appointed by the as-

---

Plume v. Small.

---

sociates to arrange for the sale and fix the conditions, at \$177 per front foot; lot No. 9, next adjoining on the north, also of twenty-five feet front, to J. W. Condit & Co. J. W. Condit (for J. W. Condit & Co.) was one of the subscribers, and one of said committee. The barn was struck off to G. D. Small; the main house to A. Gifford. The buildings south of the main house, standing on the lot bought by Small, were struck off to Joel W. Condit & Co., Condit bidding for them and signing the bid in that name, on a private understanding between him and Small, that he was to buy them for Small. Lot No. 11 had been previously struck off to Small. The persons to whom the several lots and buildings were struck off, all subscribed the articles and acknowledged their purchases. J. W. Condit & Co. and A. Williams afterwards refused to take the lots struck off to them respectively, alleging that they bid in the lots for the associates; and these lots, 9 and 10, were afterwards advertised to be sold on the 9th July, 1836. On that day they were severally exposed to sale at auction. The buildings were yet standing on these lots, and also that on lot No. 11, and the barn was yet on the premises. The conditions of the second sale were headed, "Articles of sale of lots, G. D. Small property, to close a concern, July 9th, 1836."

The articles were as follows: "1st. The highest bidder to be the purchaser. 2d. The terms of payment are 15 per cent. in 6 months, 15 per cent. in 12 months, with interest, and the balance by bond in 5 years, with interest, secured by mortgage on the purchase. Deeds to bear date July 9th, 1836, from which time interest is to be paid. The building to be removed by the first day of August next."

The building had been bought by A. Gifford at the first sale, and had not yet been removed. At this sale the complainant bought these two several lots, at separate biddings—lot No. 9 at \$     per front foot, and lot No. 10 at \$     per front foot—and gave his notes and bond and mortgage according to the conditions of sale, and received a deed. Shortly before the bill was filed, Small brought his action against the complainant on his said bond.

On the 15th June, 1838, the complainant exhibited his bill, charging, as grounds of relief, that he gave his notes and bond



---

Plume v. Small.

---

and mortgage, and received his deed, under a presumption of the fairness of the transaction, and that the conditions of sale would be complied with by all the purchasers, but that afterwards, and after his notes were paid, he has been informed and believes that there were no other real bidders for the property except himself, and that any bid in opposition to him was not for the person bidding, but in behalf of Small, to inflate the price, and that the price at which the lots were struck off to him was far beyond their value. That the whole of the said Small property was situated in a well-settled and respectable part of Newark; and that for many years a public house has been kept thereon; and that there were two buildings thereon which had been, from time to time, occupied as theatres and for public shows, and that on vacant lots thereon, circus riding and other entertainments were had; and that the buildings were generally old. That in order to free the neighborhood from this demoralizing influence, the subscribers to the said articles of agreement had entered into the same, and not for any profit to be expected; and that in making such arrangement it was their design, and was so represented and understood by them and by Small, that all the buildings were to be removed from the premises, without which no reasonable inducement could be given to any person to purchase any of the lots; and that it was with that intent that, among the conditions of said articles, it was made imperative on the purchaser of each lot to remove the buildings thereon. That the buildings on the lot occupied by the complainant were removed therefrom, but that on the adjoining lot on Broad street, to the south of those bid upon by the complainant, a part of the building still remains, which had been occupied as a bar-room, and a long room in the rear thereof, in which theatrical and other exhibitions had been made; and that on the lot No. 7, in Fulton street, an old barn also remained. That Small had resided on the premises, and still continued to occupy them for some time thereafter as a tavern stand and for the purposes aforesaid; and afterwards, for a short period, leased out the lot so bought by him and the tenement thereon as a tavern stand and for the purposes aforesaid; and that the buildings thereon still continue to be maintained thereon, contrary to the design and understanding of all

---

Plume v. Small.

---

the parties interested in the purchase, and the conditions of sale under which the same was purchased ; by reason whereof the property bid off by the complainant has been greatly injured in value ; and that Small still continues to own and exercise control over the said lots so bought by him. That since the payment of his note for part of said consideration money, the complainant has been informed of the fact that Small was the true bidder for the said buildings, in the name of J. W. Condit & Co., and has also been informed that all the bidders against him were bidders in behalf of Small. That Small has brought suit on the bond given by the complainant. The bill prays an injunction to restrain the suit, and that the bond be delivered up to be canceled ; and that Small may account for and pay back to the complainant all moneys received for the lots bid off by the complainant, and that the deed for the same be decreed void, or that Small be decreed to remove the buildings.

An injunction was issued, according to the prayer of the bill.

The answer denies that there was any underbidding whatever at the second sale, and there is no proof of it. It also denies that there is anything in the conditions of sale, even if the conditions of the first sale can be considered conditions of the second also, which requires a person who bought a lot and also the building standing on it, to remove the building from it ; and I am of this opinion.

Another point is made by the proofs in the case, and the argument of counsel on the part of the complainant : it is that Small induced the first subscriber for a share to put down his name by telling him that if he would subscribe it would go, and that he should sustain no loss. Whether this would avail a purchaser at the sale made by the associates, the purchaser being one of the associates, I am not called upon to say, for the reason that no such ground is taken by the bill.

A complainant cannot be allowed to make one case by his bill and another by his proofs.

Let the injunction be dissolved, and the bill dismissed.

JOHN ROBBINS v. GEORGE D. ABRAHAMS AND HIS WIFE,  
AND JAMES BURROWS, TRUSTEE FOR THE WIFE.

1. A husband bought real estate, and directed the deed therefor to be made to another, in trust for his wife and her heirs, so that the same should not be subject to his control or debts; and on the further trust to convey the same to such person or persons, for such uses, and subject to such provisions, limitations, and agreements as the wife, by writing under seal, or by will, should give, limit, or appoint. The trustee and the wife, afterwards, executed a mortgage of the lands to secure a debt due from the husband, and the mortgage was duly acknowledged by the wife. *Held*, that the mortgage was good.

2. The deposition of the husband, offered on the part of the defendant, was held to be inadmissible.

---

George D. Abrahams, at different periods after his marriage with Phebe, his wife, bought three several tracts of land, and the deeds therefor were, by his directions, made to James Burrows, conveying the lands to the said Burrows in trust for the use and benefit of Phebe Abrahams, wife of the said George D. Abrahams, and her right heirs forever, so that the same should not be, in any manner, subject or liable to the control, debts, or liabilities of her said husband or any future husband; and on the further trust to convey the same to the use of such person or persons, for such uses and estates, and subject to such provisos, limitations and agreements as the said Phebe, notwithstanding her said coverture, or any future coverture, by any deed or deeds, writing or writings to be by her sealed and delivered, or by her will duly executed, should give, limit, and appoint. One of the said deeds was executed in May, 1830; another, in April, 1831; and the other in May, 1831.

On the 1st of May, 1839, George D. Abrahams executed to Isaac Ivins a bond of that date, conditioned for the payment of two thousand dollars, with interest, in one year; and on the same day, James Burrows, as trustee of Phebe Abrahams, and the said Phebe Abrahams, executed a mortgage of the said lands to Ivins, bearing even date with the said bond, securing the amount of the said bond.



---

Robbins v. Abrahams.

---

On the 1st of April, 1844, the said bond and mortgage were assigned by Ivins to John Robbins, the complainant. The bill was filed for the foreclosure of the said mortgage.

The mortgage was acknowledged by Mrs. Abrahams, in the usual form of acknowledgment by married women. There was a dwelling-house on one of the tracts, which was occupied by Abrahams and his family, and Abrahams also had the possession of the other lots.

Answers were put in by Burrows and Phebe Abrahams, she answering separately from her husband, by leave of the court for that purpose first obtained ; (see *ante* p. 16 ; ) and testimony was taken. The defendant, George D. Abrahams, was sworn on the part of the defendants, and his testimony was objected to as incompetent.

*H. W. Green*, for the complainant. He cited *Gresley's Eq. Evid.* 245 ; 2 *Stark. Evid.* 400 ; 1 *Burr.* 424 ; 4 *Term Rep.* 678 ; 7 *John. Ch. Rep.* 34, 229, 238 ; 1 *Green's Ch.* 131 ; 2 *Vesey* 560 ; 5 *John. Ch.* 480 ; 14 *Vesey* 542 ; 5 *Ibid.* 445 ; 6 *Ibid.* 376 ; 4 *Kent's Com.* 344, 345 ; 1 *Sugden on Powers* 508 ; 3 *John. Chan.* 134, 144 ; 15 *Vesey* 596.

*P. D. Vroom*, for defendants. He cited 3 *John. Ch.* 550, 113 ; 1 *Ves.*, Jr., 189, and *note* ; 3 *Dessauss.* 417 ; 2 *Ves.*, Jr., 497, 498 ; 2 *Ves.*, Sr., 663.

THE CHANCELLOR. The principal grounds of defence are, 1st. That, under the terms of the trust in the several deeds to Burrows, the wife could not, by any mode of direction or appointment, authorize the trustee to execute a mortgage of the lands to secure the payment of a debt of the husband. 2d. That, if she could authorize such a conveyance by the mode of direction or appointment specified in the deeds, her joining in the execution of the mortgage, without a previous deed of direction or appointment, is not sufficient.

I cannot regard this case as standing on the same ground as an ante-nuptial settlement, or as a conveyance by one person in trust for the wife of another. If I could, I should feel bound to meet the inquiry, whether some of the doctrines which seem

---

Van Scoten v. Albright.

---

to have been held elsewhere, as to the extent of the wife's right of alienation or appointment, and the mode of appointment, have ever been sanctioned in this state. But in the case before me, I am willing to take the broadest grounds that have been taken in England and in New York, sustaining conveyances by a wife, or by a trustee with her consent. I do not desire to be understood as now assenting that a husband can, at this day, in New Jersey, purchase property and direct a conveyance thereof to be made to a trustee for the use of his wife, and by that means placing it beyond the reach of subsequent creditors.

The deposition of George D. Abrahams, the husband, was objected to. I think it was incompetent.

Decree for the complainant.

---

GEORGE VAN SCOTEN v. JOHN ALBRIGHT.

By agreement under seal, J. A. covenanted to sell to G. V. a tract of land, and to make to G. V. a warrantee deed therefor, possession to be given on the 1st of April then next, and G. V., for and in consideration of the said tract of land, covenanted to pay J. A. \$1850—\$200 on the first of April then next, \$400 in one year thereafter, and the balance in installments of \$200 a year, all with interest until all should be paid. On the day fixed for the first payment, G. V. tendered the \$200, and demanded the deed and possession. J. A. refused to give the deed, unless G. V. would execute to him a mortgage on the premises, to secure the subsequent payments. On bill filed by G. V. for the specific performance of the agreement, the relief sought was denied.

---

The facts of this case sufficiently appear in the opinion delivered.

*S. G. Potts* and *W. Halsted*, for the complainant. They cited 3 *Law Lib.* 12; *Saxton* 393; 3 *Wash. C. C. Rep.* 149; 2 *Wend.* 501; 4 *Hill* 107; 3 *Johns. Rep.* 508; *Story's Eq. Pl.* 286, note; 10 *Peters' Rep.* 178; *Gresley's Eq. Evid.* 205; 2 *Vesey* 196.

---

Van Scoten v. Albright.

---

*H. W. Green*, for the defendant. He cited 1 *Story's Eq.*, §§ 161, 162, note 1; *Saxton* 52, 55; 8 *Wheat.* 174; 1 *Vern.* 267; 2 *Ves. and Beam* 306; 15 *Ves.* 329; 6 *Ibid.* 759; 1 *Johns. Ch. Rep.* 308; 4 *Wheat.* 255; 1 *Mad. Rep.* 196; 1 *Sugden on Vendors* 171, 204; 2 *Ibid.* 57; 1 *Atk.* 572; 3 *Ibid.* 272; 6 *Johns. Chan.* 117, 222; *Saxton* 281.

THE CHANCELLOR. By an article of agreement under seal, dated September 25th, 1843, John Albright covenants to sell to George Van Scoten, "and by these presents does sell," all that tract of land, situate, &c., containing about one hundred and fifty-six acres; and to make to Van Scoten, on or before the 1st of April thereafter, a good and sufficient warrantee deed, in fee simple, free from encumbrances, possession to be given on the said 1st day of April. And Van Scoten, "for and in consideration of the above tract of land," covenants and agrees to pay Albright \$1850 in cash, and to give him possession of a certain pleasure wagon valued at \$80, "the payments to be made as follows: \$200 on or before the first day of April then next ensuing; \$400 on the first of April, 1845; the balance of the purchase money to be paid in installments of \$200 a year for each and every year, all with interest, until all is paid;" and for the performance of the agreement the parties bound themselves each to the other in the penal sum of \$500. The wagon was delivered at the execution of the agreement. On the first of April thereafter, Van Scoten tendered the \$200, which, by the agreement, was to be paid on that day, and demanded the deed and possession, and the bill says he at the same time offered to give his promissory notes to Albright, for the payment of the several sums of money, the residue of the consideration, in the sums, and payable at the times, respectively, mentioned in the agreement; or to leave the agreement in full force for the payment of the said several sums, and that Albright refused to deliver the deed and possession. The bill states that Albright demands a mortgage on the premises for the consideration. The bill prays the specific performance of the agreement.

The answer admits the agreement, and states that during the negotiation, it was understood and agreed by and between the parties, that the balance of the consideration, beyond the



---

Van Scoten v. Albright.

---

\$200 to be paid on the first of April, the day on which the deed was to be delivered, was to be secured by a mortgage on the premises, and that the complainant, before the article was drawn, in the negotiations previous thereto, agreed so to secure the said balance. The defendant admits that the wagon was delivered to him, when the agreement was executed, and that he accepted it in part of the consideration, but says it was accepted only on the supposition that the complainant would secure the balance according to such previous understanding. He admits the tender of the money and demand of the deed, but denies that the complainant at the same time offered to give his promissory notes for the payment, &c., as stated in the bill, or to leave the agreement in full force for the payment of the said several sums, but says that when the complainant counted down the \$200 and demanded a deed, he asked the complainant if that was all he had to offer, and the complainant said it was, and all he was bound to offer; and that he, the defendant, refused to deliver the deed. He admits he wrote the article of agreement, but says that not being accustomed to write instruments of that kind, he used a form which was for cash payments, and consequently said nothing about securing the balance of the purchase money. He says that he had a good warrantee deed for the premises made out and executed by him and his wife to the complainant, and that he has never refused to deliver it, provided the complainant would secure the purchase money by mortgage; and that he is anxious that the complainant should accept the deed, provided he secures the purchase money by mortgage, according to the spirit and understanding of the negotiations and agreements between them.

The answer in this case is very unnecessarily long and tedious, and the testimony taken quite as much so. The complainant has endeavored to show by testimony that Albright expressly agreed to take the complainant's notes for the balance of the purchase money. The evidence does not show it. Albright has endeavored to show by testimony that the complainant agreed to give a mortgage on the premises for it. It would be unprofitable to give a minute detail of that evidence;

---

Van Scoten v. Albright.

---

and the case can be decided satisfactorily to my mind without doing so.

By the agreement, Albright agrees to sell the tract and to make a deed for it and give possession on the 1st of April, 1844. Van Scoten agrees to pay \$1850 in cash, and a wagon; \$200 on or before the said first of April, 1844; \$400 on the first of April, 1845, and the balance in installments of \$200 a year. There is nothing said in the agreement either of notes or of a mortgage to be given for the balance of the purchase money. The complainant says in his bill, that when he tendered the \$200 and demanded a deed, he offered to give his notes for the balance. The defendant denies this. It is immaterial to the question now involved, whether the complainant offered to give his notes or not. The prayer of the bill is, that Albright be decreed to convey; and if the principle on which the bill goes is correct, this is all the court would have to do. The agreement is silent as to anything being given by the complainant by way of security for or evidence of the further indebtedness for the purchase money. Perhaps the draftsman of the bill saw that if, in praying for a deed, he tendered himself ready to give his notes for the balance, a thing not called for by the agreement, he might be asked why not tender a mortgage?

The case comes to this: will the court, when asked to decree a specific performance of this contract—a matter resting in the sound judicial discretion of the court—decree that a deed shall be given without making provision for the security of the purchase money, or requiring anything to be given by the complainant as evidence of his further indebtedness for the purchase money? The court would not do this, unless it was fully satisfied of the sufficiency and sufficient convenience of the agreement itself as a lien for the purchase money. But though the purchase money might be a lien, it is not such a one as the court should leave the defendant to, when asked by the complainant to give him its aid in enforcing the performance of the agreement.

If the complainant is unwilling to give a mortgage, his bill will be dismissed.

---

Ballentine v. Ballentine.

---

## BALLENTINE v. BALLENTINE.

On bill by a wife against her husband, for alimony and maintenance, and for the support and maintenance of their child, and answer put in by the husband, and petition filed by the complainant for a proper allowance, until the final termination of the suit, and for an order directing the defendant to pay a proper sum for counsel fees, and to defray the expenses of the suit, the court, under the circumstances of the case, made an order directing the husband to pay two dollars and fifty cents a week towards the support of the child and the complainant, while she should keep the child, till the further order of the court, and made no order as to counsel fees and expenses of the suit.

The bill is exhibited by the wife against her husband, for alimony and maintenance of the complainant, and for the support and maintenance of their child. It states that the marriage took place May 13th, 1844, in Newark. That a child was born of the marriage, and that they lived together in Newark, till June, 1845, when she left home, with the consent and concurrence of the defendant, and under the care of her brother, on a temporary visit to her said brother, in Orange county, New York. That she continued in Orange county near four months. That in October, 1845, she received a letter, dated September 12th, purporting to be written by Asa Whitehead, on behalf of her husband, stating that her husband had directed him to remit to her twelve dollars, enclosed in the letter, for the maintenance of the child, and stating that the writer understood her husband to say that, for the present, he would pay fifty dollars a year, in quarterly payments, for the same object, and that he, Ballentine, did not consider, after what had transpired, that he was bound, or ought to contribute anything towards her maintenance. That, about a week after she received this letter, she set out from the house of her brother, and in his company, to return to Newark, where she arrived on Saturday evening, the 25th October, 1845. That, shortly after arriving at the residence of her husband, he came in, and, on her accosting him, he made no reply, but left the house, and that his mother forbid her to stay in the house, and told her they had business so arranged that she could not come back, and



---

Ballentine v. Ballentine.

---

had no place there; that the house was hers, and she, the complainant, could not live there.

The bill states that the house had been rented by Ballentine, for a year from April 1st, 1845. That she remained in the house that night, and, finding that her husband absented himself from the house, or kept out of the way, so as not to be seen by her, and evinced a determination to have no communication or intercourse with her, and that he and his mother designed to drive her from the house, she, on the next morning, left the house, taking her child with her. That, about a week or ten days after, she went again to her husband's house, and took dinner there. That her mother-in-law again told her she could not have a home there. That on her addressing her husband, and attempting to come to some understanding with him, he made no reply—said not a word to her—and left the house. That she has caused applications to be made to him, to make a suitable provision for her support, or to permit her to live with him, but he has declared, in answer thereto, that he would never consent to have her live with him again; and he has declined and refused to make her any allowance for her support, offering only to allow twelve shillings a week for the maintenance of the child. That her husband is a journeyman jeweler, and earns about fifteen dollars a week. That she, previous to her marriage, was a mantuamaker; that the child is between ten and eleven months old, and of a delicate constitution, requiring a great deal of her time and attention.

The answer of the defendant states that, at the time of the marriage and of the birth of the child, the parties resided in Newark, and that the defendant has ever since resided in Newark. That the complainant, except as after stated in the answer, continued to reside in Newark till the filing of her bill. That the complainant lived with him, as his wife, till some time in June, 1845, when she left him. He denies that he has any knowledge, information, or belief that the complainant was then in feeble health, or debilitated by nursing and taking care of the child, but says that, as far as he knows, and as he believes she was, when she left with her brother, Gilbert Conklin, as stated in her bill, in June, 1845, in her ordinary good health; that he has no knowledge, remembrance, or belief that she then

complained or alleged that she was in feeble health, or debilitated, aforesaid, or that she had any occasion to go away on account of her health. He denies that she left him on a temporary visit to her brother, or for the purpose of making him a visit; but says that, on the contrary, before she left, and when she left, she declared her intention of going, and that she did not intend to return; that before that time she had frequently said she did not wish or intend to live with him, but intended to leave and live separate from him; that before she went away she packed up all her wearing apparel and her bed, including several things which had been procured after the marriage and took as many of them as her brother could carry in his wagon, and the remainder she left, with directions to send them to the house of her friend, James Durie, who, she said, would send them to her; and that James Durie afterwards called for the same and carried or sent them to the complainant; that he, the defendant, told the complainant there was a house and a home for her, and that she could remain there as long as she pleased; but that she, notwithstanding, declared her intention of leaving him and not to live with him again; that she expressed her utter disregard for him, and among other opprobrious observations, said she thought no more of him than she did of a negro; and when he showed some concern at the manner in which she was proceeding, she slapped her hands, and said he need not feel bad about her going away, for she was glad she was going, or used words to the like effect.

That the complainant having stated to him her determination to leave him and to go to Warwick, in the State of New York, with her child, and to remain there, he promised to pay her fifty dollars a year, in quarterly payments, for the care and maintenance of the child; and that in pursuance of this arrangement, he procured Mr. Whitehead to write her and enclosed twelve dollars; that Mr. Whitehead, in the letter to her, expressed the object of sending said money, and it may be that in other respects the letter is as stated in the bill, but that he has no copy thereof and cannot state with certainty. He says he does not know how she spent her time at Warwick, but denies that she went there on a temporary visit; and says she went

---

Ballentine v. Ballentine.

---

there for the professed purpose of taking up her residence, and with the declared intention of not returning to him.

That in October, 1845, four months or more after she left as aforesaid, she returned to the house where he was living with his mother, in Newark, late at night; that his mother prepared supper for her, of which she partook; that she immediately declared she had not returned for the purpose of staying; that her brother had been informed he had made himself liable to a prosecution for taking her away, and that her object in returning was to save him from it; that she desired an omnibus might be sent for, to take her to Mr. Durie's, where she intended to go; that his mother invited her to stay, and remonstrated with her against going out at so late an hour, and after considerable persuasion she consented to stay all night, and did so; that the next morning, between six and seven o'clock, she left the house, and, as he has been informed and believes, went to Mr. Durie's; that after she arose in the morning, his mother requested her to stay to breakfast, but she declined, and went away, using opprobrious language both with respect to him and his mother; that he received no notice from her of her intention to return to Newark, previous to her returning as aforesaid; that after what she had said and done as aforesaid, he was much surprised, and hardly knew what her object was, and it may be that he made no reply when she accosted him; but he denies that she said anything to him by which she expressed any desire to live with him again or claiming from him any protection as her husband.

He says he was not present at any conversation between his mother and the complainant, in which his mother used the language to the complainant stated in the bill, nor does he know whether such language was used; and he denies that any such language was used by his request, advice or direction. He admits that the house in which he lived when complainant returned to Newark, had been rented by him from April 1st, then last past, for one year; but says that the furniture in the house belonged to his mother, and that she and two of her grandchildren lived in the house with him, and that she had the charge and direction of the affairs of the family. That from the time complainant returned, to the filing of the bill, she did not, either



---

Ballentine v. Ballentine.

---

herself or through any other person, make any overture or application to him to be received by him, or to live with him again as his wife, but he admits he was applied to several times on her behalf to make a provision for her maintenance; and he says he offered to make a provision for the support of the child which he believed and was advised was liberal and more than necessary for that purpose; that, through his counsel, he offered to pay one hundred dollars a year, and give security therefor, on security being given to indemnify him against any further charges; that he understood she was willing to receive that sum, and supposed the matter would be amicably settled, but that, while negotiations were pending, the complainant suddenly filed her bill. Admits that application was made to him by Durie for the payment of complainant's board; that he referred Durie to his counsel, Mr. Whitehead, and he is informed and believes that Durie called on Mr. W., and that Mr. W. suggested to him that, as negotiations were pending for an arrangement, it would be better to let it remain till the negotiations were concluded, and that if they resulted in a settlement, there would be no difficulty in his bill being satisfactorily adjusted; in which suggestion he is informed and believes Mr. Durie acquiesced.

He says he is informed and believes that Mr. W. said nothing touching the defendant's paying or being liable to pay said bill, other than as before stated. That he is a jeweler, employed by Isaac Baldwin & Co.; that his wages at first were seven dollars a week; that for eighteen months past, or thereabouts, they have amounted to fifteen dollars a week; that the business is subject to depressions, and that depression is now apprehended; that complainant is a mantuamaker, and, as far as he knows and believes, is now in good health, and able to pursue her business and provide for herself; that he is willing, either to take charge of the child and provide for it, or, for the present, to let it remain with the complainant and make her a liberal compensation for her care of it and its maintenance. He says the child has an ordinarily good constitution, and, as far as he knows and believes, has usually been in good health. That he has no estate except his ordinary wearing apparel and a few articles of furniture, of small value, and a small sum, not ex-

---

Ballentine v. Ballentine.

---

ceeding \$110, due him from his employers; and that he is solely dependent for his support on his daily labor. He says that one of the propositions made by complainant, through one of her friends, to his counsel, was, that he should pay her \$100 a year for five years, and that she would take care of herself and the child; that his counsel agreed to the proposal, with the qualification that the money should be considered as paid for the support of the child, the complainant, however, to have the disposition thereof, and the defendant to give security for the payment, on condition that she would indemnify him against any further claim on her account or that of the child, but that she refused or neglected to comply. That another proposition made by her was that he should pay her down \$500, and that she would take care of herself and the child, but that she offered no adequate security for his indemnity, and he declined the proposition as well because he considered it unjust and unreasonable as that he was unable to comply with it by paying the money, and that no adequate security was offered for his indemnity.

The complainant filed a petition for a proper allowance until the final termination of the suit, and for an order directing the defendant to pay a proper sum for counsel fees, and to defray the costs and expenses of the suit, and by her counsel moved for an order accordingly. The motion was resisted. Affidavits were read in opposition to the motion.

*Wm. M. Scudder*, for the motion. He cited 8 *Wend.* 367, 368; 2 *Hoff. Ch. Pr.* 246; 2 *Paige* 115, 621; 1 *John. Chan. Rep.* 108; 1 *Edw. Ch. Rep.* 382; *Ibid.* 62.

*A. Whitehead*, *contra*. He cited 1 *John. Ch.* 604; 6 *Ibid.* 91.

**THE CHANCELLOR.** The question which will be involved in this case, if it proceeds to a hearing on the merits, will be, whether the defendant has abandoned his wife or separated himself from her and refused or neglected to maintain and provide for her. *Rev. Stat.* 924, § 10. The bill contains no charge that he has neglected or refused to provide for her in his

---

Ballentine v. Ballentine.

---

own house, nor does it show any sincere desire on her part to go back to his house and live with him as a wife and be maintained and supported by him there, nor is there any sufficient reason offered in the bill why she again left her husband's house the morning after she returned from the State of New York. It is her duty to live with her husband unless there be some sufficient reason for leaving his house ; and if she has left it without sufficient reason, it is her duty to return.

The nature of the case made by the bill may be considered on an application for alimony pending the suit. In this case, an order will be made for a weekly allowance of two dollars and fifty cents, for or towards the support of the child of the complainant while she keeps the child, until the further order of the court. The other branch of the motion is denied.

Order accordingly.

CITED in *Martin v. Martin*, 4 Hal. Ch. 569.

---

THE ADMINISTRATOR OF EDWARD S. BELL v. JOHN H. HALL  
AND HENRY B. STOLL

---

A and B, partners, dissolved partnership, and by the articles of dissolution A took the property of the partnership, and agreed to pay the debts of the partnership, and to relieve B therefrom, and to pay B the balance due him of the capital invested by him, and the further sum of \$1600 for his share of the stock and profits of the partnership. After the dissolution, a creditor of the partnership obtained a judgment against A and B for a debt of the firm, for \$607.91, and issued execution thereon, which was levied on the personal and real estate of both A and B. A's personal property so levied on, consisting of store goods and other personal property, was afterwards assigned to C, the father-in-law of A. A afterwards sold to D the stock of goods he then had on hand, and C thereupon, by writing under seal, released to D all his interest in the goods under and by virtue of the said execution, with full knowledge of the terms of the dissolution. Held that the judgment could not be enforced against B.

The facts of this case sufficiently appear in the opinion of the Chancellor.

C. S. Leport and F. T. Frelinghuysen, for the complainant. They cited *Montague on Part.* 204 ; 17 *John. Rep.*



---

 Bell v. Hall.
 

---

384; 13 *Ibid.* 174; 7 *Ibid.* 336; 10 *Wend.* 162; 1 *M'Cord's Ch.* 443; 1 *Story's Eq.*, § 325, 326, 449, 499; 4 *Harr. Rep.* 167.

*W. S. Johnson* and *D. Haines*, for the defendants. They cited *Theobald on Principal and Surety* 239, 240; 1 *Law Lib.* 84, 135, 142, 143; 2 *Swanst.* 185; 4 *Vesey* 824; 1 *Story's Eq.*, §§ 163, 676; 8 *Wheat.* 212; 1 *Peters* 16; 6 *Hals.* 224; 2 *South.* 584.

THE CHANCELLOR. On the 16th March, 1840, Henry B. Stoll and Edward S. Bell entered into partnership as merchants in Stanhope, under the partnership name of Stoll & Bell, each furnishing an equal amount of capital. They purchased a stock of goods on the same day, from Andrew A. Smalley, for the purposes of their partnership, amounting to \$3750, for which they gave Smalley their notes, in different sums, payable at different periods.

On the 11th March, 1841, the partnership was dissolved by mutual consent, by agreement in writing and under seal. By this agreement, Stoll took the stock of goods and merchandise then on hand belonging to the partnership, and all the books of account, notes, bonds, moneys and effects of the partnership, and all debts due the partnership, Bell relinquishing all claim thereto; and Stoll agreed to pay all the debts of the partnership, and to relieve Bell therefrom, and to pay Bell the balance due him of the capital invested by him, and the further sum of \$1600, for his share of the stock and profits of the partnership. One of the notes from Stoll & Bell to Smalley passed into the hands of Coursen & Woodruff, of New York; it was for \$583.91. On the 23d May, 1843, Coursen & Woodruff recovered judgment on this note against Stoll & Bell, in the Circuit Court of Sussex, for \$607.91 damages, and \$36.41 costs, and thereupon issued execution, returnable to the term of August, 1843, of that court, which was put into the hands of the sheriff on the 26th May, 1843. By virtue of this writ, the sheriff levied on the personal and real estate of both Stoll & Bell. The property of Stoll levied on consisted of store

---

Bell v. Hall.

---

goods, household furniture, a pair of horses, &c., and also a house and lot in which Stoll lived.

The under sheriff says this levy was made about the 1st of June, 1843; and that, after he had received the execution, he called on Bell, and Bell told him it was a debt of the firm, and to be paid by Stoll; that he then called on Stoll and informed him of the execution, and asked him if it was his debt to pay, and he said it was; that, in consequence of this, he took a more full and particular levy of the property of Stoll than that of Bell. In the latter part of August, 1843, the deputy sheriff advertised the said estate of both the defendants in the said execution by hand-bills. The under sheriff further says that, before the time arrived for advertising in the papers, he received notice that the judgment had been assigned to John H. Hall. He thinks Hall showed him the assignment; and his impression is, that it was in consequence of directions from Hall that he did not put advertisements in the papers. He believes he had a written stay from Hall. He says he was called on several times by Bell, and urged by him to proceed with the execution; that he uniformly told Bell he was under the direction of Hall in relation to the matter, and could not go on without his instructions.

The judgment was assigned by Coursen & Woodruff to Hall in September, 1843; the assignment bears date September 20th, 1843; the receipt of E. W. Whelpley, the attorney of Coursen & Woodruff, is dated September 25th, 1843; it is for John H. Hall's note for \$548.22, at six months, endorsed by John Bell, on account of assignment of Coursen & Woodruff's judgment against Stoll & Bell.

Coursen says the assignment was made to Hall at the urgent request of Stoll. It seems to have been executed on the 20th, and sent out by Coursen & Woodruff to their attorney.

The answer says that, on or about September 1st, 1843, Stoll paid \$125 to Coursen & Woodruff on their execution.

Hall admits that the Coursen & Woodruff judgment against Stoll & Bell was for their joint debt, and that it was so understood by him at the time he became the owner of it. He admits he stayed the execution till his further order, and says that, at the time of the assignment to him of the judgment of Coursen

---

Bell v. Hall.

---

& Woodruff he had no knowledge or intimation of any agreement or understanding between Stoll & Beil that Stoll was to pay the debts of the firm, as alleged in the bill; that he has never seen any such agreement or understanding, and had no knowledge of any till some time after the assignment and stay of execution, when it was alleged by Bell that Stoll was bound to pay all the debts of the firm. He admits that Robert P. Stoll, about the 1st of October, 1843, called on him and stated to him that Bell wished the money due on the Coursen & Woodruff execution to be raised out of the property of Stoll only, or words to that effect; but says that Robert did not represent himself as the agent of Bell, or that he came at his request.

About the 20th November, 1843, H. B. Stoll agreed to sell to Smalley the stock of goods he then had, at \$1300; and three notes were drawn for the consideration money; but, before the notes were delivered, Smalley told Stoll he wanted to be satisfied that there was no encumbrance on the goods. Smalley testifies that Stoll told him there was no encumbrance on the goods, and wished him to give him the notes. That, soon after this, he, Smalley, ascertained that a judgment had been obtained by Coursen & Woodruff against Stoll & Bell, and that execution had been issued thereon, and levied on Stoll's store goods; and that the judgment had been assigned to Hall.

On the 25th November, 1843, Hall, by writing under seal, released to Smalley all his right to the goods under and by virtue of the said execution. Smalley says that, in the course of the negotiation between him and Stoll, Stoll told him that Hall was to have the notes, or a part of them; that Stoll married a daughter of Hall, and his wife is living.

On the 24th November, 1843, Stoll conveyed to Hall his real estate. It was subject to mortgages. On the 2d December, 1843, Hall gave his note to Andrew Shiner for \$711, at fifteen months, with interest, for a debt of Stoll's. On the same day, Stoll gave his note to Hall for \$711, at fifteen months, with interest, stating in the body of it, that it was for value received by the note of Hall that day given to the order of A. Shiner, for his, Stoll's, debt. Hall gave his receipt, of the date of December 13th, 1843, acknowledging the receipt from Stoll of two notes of Smalley, dated November 20th, 1843, for \$433.23



---

Bell v. Hall.

---

each, payable, one in twelve and the other in twenty-four months from date, stating that, out of the proceeds, when collected, he is to deduct the amount that may then be due on Stoll's note to him of 2d December, 1843, for \$711, at fifteen months, with interest, and pay Stoll the balance. On the face of this receipt is written, "Settled by the note of \$711, and endorsing \$88.16 on note of 20th June, 1844," being a note of this date, for \$250, on demand, with interest, given by Stoll to Hall.

On the face of the note from Stoll to Hall, of December 2d, 1843, for \$711, is written, "Paid 20th November, 1844, passing two of the Smalley notes to Coursen & Co., and taking up my note for which this was given."

It seems that the note for \$711, given by Hall to Shiner, was to satisfy a *ca. sa.*, which Shiner, as sheriff, had against H. B. Stoll and R. P. Stoll, in favor of Coursen & Co., on which H. B. Stoll had been arrested.

The foregoing facts seem to be undisputed. It is further alleged, in the bill, that Hall had notice of the terms of the agreement of dissolution before he received the assignment of the judgment of Courson & Woodruff.

Hall's answer to this charge is not so clear and satisfactory as it might have been, and there is some very persuasive evidence that he might have had such notice before he received the assignment, but I do not think it necessary to determine how this is. There can be no doubt, from Hall's answer, and the proofs in the case, that before he released to Smalley his right to the goods, by virtue of the execution, he knew that Stoll, by the agreement of dissolution, was to pay the debts of the firm of Stoll & Bell, and there is evidence quite satisfactory to my mind, that he had been urged by Bell to proceed to a sale on the execution.

If Hall, before he received the assignment of the judgment and execution, knew that Stoll was to pay the debts of the firm, then the acts of Hall, which followed the assignment, are, it seems to me, very strong to show a design in Hall, in taking the assignment, to aid Stoll in withdrawing his property that had been levied on from the lien of the execution, and compelling the sheriff to make the debt out of the property of Bell.

---

Bell v. Hall.

---

The resort to such a measure, and the urgency of Stoll to have the judgment assigned to Hall, show that, in all probability, if Coursen & Woodruff had retained the judgment and execution, they would have made the debt out of Stoll's property, and this probability is greatly strengthened by the testimony of undersheriff M'Carter. Stoll had told him it was his debt to pay, and he had, in consequence thereof, taken a fuller and more particular levy on the property of Stoll than on that of Bell, and had levied on property of Stoll amply sufficient to pay the whole debt.

I am very much inclined to think that if Stoll could have influenced Coursen & Woodruff to take the same course that Hall took after he received the assignment, *i. e.*, relieve his goods and drive the sheriff on the property of Bell, no assignment would have been urged or made.

If I thought the case required me to go so far, in order to relieve the complainant, I should find it very difficult to avoid the conclusion that, at least as early as when he gave his note to Mr. Whelpley, the attorney of Coursen & Woodruff, for the assignment, Hall was sufficiently apprised of the terms of the dissolution, and of the object of Stoll's agency and urgency in having the assignment made. If he was, then he lent himself to aid Stoll in the design of relieving his property from an execution debt which, as between him and Bell, he was bound to pay, and of throwing the debt upon Bell. This would not be countenanced in equity. But, as I have said before, I do not think it necessary to go so far. It is clear that, before Hall gave the release to Smalley, he knew that, by the terms of the dissolution, Stoll was to pay this debt, and, on being asked to give the release, he could not fail, with his knowledge of the course things had taken, to perceive that he was asked to do a positive act which would give effect to all the preceding steps in the transaction, and to perceive what must have been Stoll's design from the beginning. His giving the release, under such circumstances, must be considered as an adoption, with full knowledge, of Stoll's aim and object, and a positive agency in accomplishing them. If Hall had, before, but indistinct glimmerings of the design, not amounting to knowledge or information, it was now fully revealed to him, and, if he might have re-

---

Bell v. Hall.

---

mained passive, and permitted the sheriff to take his own course on the execution, and make the money where he pleased; or if the sheriff threatened to sell Bell's property first, might have stood still and left Bell to his application to this court, I cannot think he was at liberty to do a positive act injurious to Bell, by releasing the goods and thereby rendering it impossible either for the sheriff to sell them to raise the debt, or for Bell to take any measures to that end.

It appears to me that a regard for the doctrines of this court, and a purpose to give them their due influence and control over the transactions of men, require me to say that Hall should not have released the goods without stipulating for the payment of his judgment and execution out of the proceeds of the sale to Smalley.

I do not think it necessary to order a reference to ascertain how much, in amount, of Stoll's goods that were levied on, remained in the store at the time of the sale of the stock to Smalley. It would be a very difficult inquiry, and it is not likely that any more satisfactory evidence could be produced on this part of the subject than is now before the court; and I am inclined to think from the testimony that the sheriff could have made, from his levy on the goods of Stoll, enough to pay the balance due on the execution.

Again, it appears to me that the release, with the full knowledge Hall had at the time it was made, was such an adoption of all the preceding acts tending to the same end, that he should be held responsible for the effects of the stay of execution, even if it be doubtful whether he had sufficient knowledge before the stay to charge him with its effects.

I am of opinion that Bell and his property are relieved from the judgment.

Decree accordingly.



---

Smith v. Ex'rs of Smith.

---

**BENJAMIN SMITH AND OTHERS v. THE EXECUTORS OF BENJAMIN SMITH AND OTHERS.**

On bill stating that J. B. S. left the state more than seven years before, and had not been heard from, and founded on the presumption of his death thence arising, and answer admitting the absence, but denying that he had not been heard from, and stating that the defendants are informed and believe that he had been heard from, and replication—*held*, that unless the defendants made proof that J. B. S. was alive within the seven years, the presumption of his death arising at the expiration of the seven years stood.

Benjamin Smith, deceased, late of Elizabethtown, died in November, 1824, leaving a will, by which, after giving several legacies, he gave the residue of his estate to the children of his nephews, Benjamin Smith and Israel Smith, share and share alike, "to them, the survivors or survivor of them at the time any dividend is made for them by my executors."

No dividend was made by the executors until 1840. The executors, when they made the dividend, retained the share that would be payable to Jasper B. Smith, if he was alive.

Jasper B. Smith left the state in 1829, and the bill was filed by the other children of Benjamin Smith and Israel Smith, to recover their shares of the portion so retained by the executors as and for the share of Jasper B. Smith.

The bill, filed in 1844, states that Jasper B. Smith left the state in 1829, being then a minor of about nineteen years of age, and had not since been heard from; and is founded on the presumption of his death thence arising, under the provisions of our "act declaring when the death of persons absenting themselves shall be presumed." *Rev. Stat.* 781.

The answer admits that Jasper B. Smith left the state in April, 1829, but denies that he had not been heard from; and states that the defendants are informed and believe that he had been heard from twice since he absented himself from the state, once in August, 1830, and once in the fall of 1835.

A replication was filed and proofs were taken in the cause.

*J. C. Potts*, for the complainants.

*Wm. Halsted*, for defendants.

---

Ex'rs of Vandyne v. Vanness.

---

THE CHANCELLOR. The statute provides that any person who shall absent himself or herself from the state for seven years successively, shall be presumed to be dead, unless proof be made that he or she was alive within that time. The bill states that Jasper B. Smith left the state in 1829, and that he has never been heard from since. The answer admits his absence from the state since 1829, but says he has been heard from. A replication was filed by the complainants.

The words of the statute and the reason of the thing require that, unless proof be made that the person absenting himself has been heard from, the presumption of his death arises at the expiration of seven successive years of absence. The party seeking to avoid this presumption, or, rather, to prevent its arising, can do it only by showing that the absent person was alive within the seven years. There is nothing in the evidence to show that Jasper was alive within seven years after he left the state.

As the case stands in proof, he left the state in the spring of 1829, and the presumption of his death arose in 1836. No dividend had then been made, and by the terms of the will the estate was to be divided among the surviving residuary legatees.

---

THE EXECUTORS OF NICHOLAS VANDYNE v. JACOB S. VANNESS AND OTHERS.

1. Construction of 'the mechanics' lien law applicable to some parts of the state.

2. A carpenter finished a dwelling-house on a tract of land on the 17th November, 1842, and filed his claim in the office of the clerk of the county, on the 17th January, 1843. On the 22d December, 1842, the owner of the land, then in possession of the house, mortgaged it to a person having no actual knowledge of the carpenter's lien. *Held*, that the carpenter's lien was prior to that of the mortgage.

3. It was held that the carpenter's lien was not confined to the house and the ground it covered, but extended to so much of the tract of land on which the house was built as, with the house, would be required to discharge it.

---

Bill for the foreclosure of a mortgage given by Jacob S. Vanness to Nicholas Vandyne, since deceased, dated Novem-

---

Ex'rs of Vandyne v. Vanness.

---

ber 24th, 1838, and recorded November 24th, 1838. T. B. & I. Odell and Evert Vanness, subsequent mortgagees, and Henry H. Vanness, Morrell & Post, Wilson & Wilson and Daniel Schoonmaker, subsequent judgment creditors of the mortgagee, were made defendants.

The defendant Schoonmaker, in his answer, states that he is a carpenter; that on or about January 17th, 1842, he entered into an agreement with J. S. Vanness, by which Vanness employed him to build a dwelling-house, store-house, and other improvements on part of the tract of land mentioned in the mortgage of the complainants; and that he, soon thereafter, commenced labor thereat, and employed laborers and workmen in preparing materials and putting up said improvements; and that he finished the same on or about November 17th, 1842. That on or about January 17th, 1843, within six months after the completion of the said work, he filed in the clerk's office of the county of Passaic, a claim in writing for his said work and labor, in the words and figures, &c., (giving the claim as filed,) with a declaration annexed thereto of holding a lien on the said buildings for the balance of \$312.86, under and by virtue of an act of the legislature of the State of New Jersey, entitled "An act for securing to mechanics and others payment for their labor and materials in erecting any house or other building within the limits therein mentioned," passed March 3d, 1835, and the supplement thereto.

That on or about February 8th, 1843, within six months after the completion of said work, he brought an action on the case, in the Circuit Court of Passaic county, for the recovery of his said claim thus filed; that he filed a declaration in that action for the amount due him on his said claim, and in his declaration claimed as having a lien on all the said dwelling-house, store and improvements, and also on all that lot of land beginning at the S. W. corner of the lot belonging to D. Schoonmaker, and on the line of the Newark and Pompton turnpike road; thence running south along said road 300 feet; thence easterly and at right angles to said road 150 feet; thence north 300 feet to said D. Schoonmaker's line; thence west 150 feet to the place of beginning. That J. S. Vanness defended the said action, and that, on the 19th July, 1843, he obtained a judgment



---

Ex'rs of Vandyne v. Vanness.

---

against Vanness, on the verdict of a jury, for \$300.86 damages and \$46.58 costs.

He admits that on or about February 11th, 1843, Cornelius Vanness filed in the clerk's office a lien or claim of about \$60 for mason work done to said house and buildings, and that on or about February 25th, 1843, Jacob Vanness assigned to James Vanness all his estate, real and personal, in trust for his creditors, and that said deed of assignment was acknowledged and recorded as stated in the bill.

He says that the said action brought by him against said J. S. Vanness, was brought and prosecuted under the said act of the legislature and the said supplement thereto. That on or about July 19th, 1843, execution was issued on his said judgment, directed to the sheriff of Passaic county, commanding him to sell the said dwelling-house and other buildings and the lot of land on which the same was erected, in the township of Manchester, in the county of Passaic, aforesaid, the said lot of land being therein particularly described; and that the sheriff, by virtue of said execution, levied on the said buildings and land; and he claims that by reason of the facts set forth in his answer, the claim thus filed by him was a lien on the said buildings and the land on which they were erected, and that the encumbrances of the other defendants are all subsequent to the completion of his work on the said buildings. He insists that if, on a sale of the property under a decree of this court, there should not be enough raised to satisfy the complainant's mortgage and his lien, he is entitled, either to be paid a ratable proportion with the complainant, of the proceeds of the sale, or that he has a priority, next subsequent to the complainant's mortgage, over all the other encumbrances; and he submits that the premises covered by the complainant's mortgage, excepting thereout the lot of land on which the buildings were erected, and on which he has filed his lien, obtained judgment and issued execution, should be first sold.

The answer of Morrell & Post states that they are lumber merchants, and that in 1842, J. S. Vanness, being in possession of the mortgaged premises, which were then lawfully encumbered, as they are informed and believe, only by the mortgage of the complainants, and being about to erect on the mort-

---

Ex'rs of Vandyne v. Vanness.

---

gaged premises, or a part of them, a dwelling-house and store, they, on his application, and from July 27th, 1842, to October 13th, 1842, furnished him with lumber to the value of \$235.99, which was used by Vanness in and about the erection of said buildings on a part of the mortgaged premises. That within six months after furnishing the lumber, and on the 21st January, 1843, they filed their claim for said lumber in the clerk's office of the county of Passaic. That at the term of February, 1843, of the Circuit Court of Passaic county, they brought an action against Vanness for the recovery of their said claim, and that on the 18th July, 1843, they recovered for their said claim a judgment against Vanness for \$235.97 damages and \$33.92 costs. That execution was issued on said judgment, against the buildings and the land whereon the same were erected, and delivered to the sheriff, which remains in his hands unsatisfied.

The answer of the Odells states that on or about December 9th, 1842, J. S. Vanness applied to them for dry goods on credit, and represented to them that his farm and improvements, (being the same described in the bill,) were free from encumbrance except the mortgage held by the complainants, and offered them a mortgage on the same premises for the goods he wanted. That they thereupon made inquiries as to the situation and value of the premises, and having caused the records to be searched, found no encumbrance thereon except the mortgage held by the complainants. That in reliance on the security proposed, they sold to Vanness the goods he wanted. That Vanness, having thus become indebted to them, on the 22d December, 1842, gave them his bond of that date, conditioned for the payment of \$1000 on or before the 22d June following, with interest, and that, to secure the said bond, Vanness and his wife, on the same day, executed to them a mortgage on the premises described in the mortgage held by the complainants. That the said mortgage was acknowledged January 5th, 1843, and recorded the next day.

They say that when they received the said mortgage the said mortgagor was in possession and occupancy of the buildings which were erected on the premises; that the judgment creditors had not filed any claim under the acts of the legislature to

---

Ex'rs of Vandyne v. Vanness.

---

secure mechanics, &c., nor commenced their suits; and that these defendants, having neither actual nor constructive notice of their pretended liens, sold their goods in good faith, relying for security of payment on the value of the premises and improvements thereon embraced in their mortgage; and they submit that the said acts do not create a lien on the premises, or any part thereof, which, under the circumstances of the case, should be preferred to their mortgage; that their mortgage being made and recorded prior to any act done by those defendants under said acts of the legislature, and before the judgments in favor of those defendants were rendered, their mortgage is valid against all subsequent judgment creditors and all claiming a preference by virtue of said acts of the legislature and of proceedings subsequent to the registry of their mortgage; and they further submit that if the defendants who claim a preference under the said acts, have any prior liens on said buildings, such liens are confined to the buildings, and do not extend to or affect the land on which the buildings have been erected, to the prejudice of prior *bona fide* mortgagees.

And they further submit that as the said defendants made their election, under the second section of said acts, to proceed for the recovery of their demand by personal action, instead of proceeding by *scire facias* to enforce their liens, they have waived their preference, and were not authorized to issue executions against the buildings and land on which they were erected, so as to claim priority over them.

The answer of Evert H. Vanness states his mortgage, and that it was recorded, without saying when; and claims that it has priority over all other encumbrances except that of the complainants. This mortgage is dated January 7th, 1843.

The cause was brought to hearing on the bill and answers.

*P. D. Vroom*, for the mortgagees.

*H. W. Green*, for the mechanics.

THE CHANCELLOR. The controversy is between the mortgagees holding mortgages subsequent to the complainants' mortgage, and the mechanics claiming liens, under the statutes



---

Ex'rs of Vandyne v. Vanness.

---

referred to in their answers, for work and labor and materials found in and for the erection of the buildings.

The first section of the act provides that all claims for such work and materials shall be filed in the office of the clerk of the county, within six months from the time the work is done or the materials are furnished. The second section provides that in all cases of lien created by the act, the person having a claim filed as aforesaid, may, at his election, proceed to recover it by personal action against the debtor, or by *scire facias* against the debtor and owner or owners of the buildings; and when the proceeding is by *scire facias*, if the defendant fail to appear, the court shall render judgment as in other cases on writs of *scire facias*; but if he appear, he may plead and make defence, and the like proceedings be had as in personal actions for the recovery of debts; and upon judgment being rendered thereupon, execution shall issue against the building and land on which the same is erected, subject to all prior claims as aforesaid; that is, in the language of the first section, all prior claims on mortgage or judgment against the land-owner on the land on which the building is erected, and prior to the erection thereof. The act creates a lien for the materials found for and the work done in erecting the building, from the time of the material found or the work done, if the claim is filed within six months from that time. There is another provision in the first section of the act, that no such demand shall remain a lien longer than two years from the commencement of the building, unless the claim be filed within six months after performing the work, or furnishing the materials, and an action for the recovery of the same be instituted within one year after the work done or material found.

The extent of the lien, as to the subject of it, is shown by the mode pointed out, in the act, of enforcing it at law. It is to be enforced at law by judgment for the claim filed, and execution against the building and land on which the same is erected. The lien, therefore, is on the building and land on which it is erected.

It was argued that proceeding by personal action against the debtor was a waiver of the lien. This cannot be so, consistently with the provision that the demand shall remain a lien for

---

Ex'rs of Vandyne v. Vanness.

---

two years, if the claim be filed within six months, and an action for the recovery of the same be instituted within a year after the work done or materials found. The only consistent reading of the section pointing out the mode of enforcing the lien at law is, that the person having a claim filed as aforesaid may, at his election, proceed to recover it by personal action against the debtor, or by *scire facias* against the debtor and owner of the building, and, on judgment being rendered on the claim, in either mode of proceeding, execution shall issue against the building and land upon which the same is erected, subject only to such prior claims as are mentioned in the first section.

The claims of the mechanics, in this case, were subsisting liens at the filing of the bill—nothing had, or has been done or omitted, to forfeit or bar them—and this court must give them effect according to the provisions of the act. If there should not be enough to pay them both, after paying the mortgage of the complainants, they must pay ratably.

On what land are the claims liens? The act says, *the building and the land* on which it is erected. Is it only the land which the building covers, or is it all of any distinct tract of land on which the building stands? It seems to me it must be one or the other. If it be not confined to the land covered by the building—and this, I think, would be an absurdity—it must be the tract on which the building stands, for, if this be not so, we must make the equally absurd supposition that the legislature intended that the parties, or one of them, or the court, should determine what part of the tract should be subject to the lien, that is, how much of a tract, besides the foundation, a house shall be held to stand upon.

How shall the property be sold? If the whole of the land mortgaged to the complainants will not bring enough to pay them, it is unimportant to the subsequent encumbrancers how the property is sold. If it bring more than the first encumbrance, the building must be supposed to contribute to such surplus, and such surplus should go to pay for the building. The court, on general principles, might order the property sold together or in such parcels as it might direct, as should seem most advantageous for the encumbrancers. It seems to me that the court can act on no other principles in this case, and that no

---

Ex'rs of Vandyne v. Vanness.

---

advantage could result to the subsequent encumbrancers, or any of them, in this case, from the adoption of any other principle or mode of sale. A holds a mortgage on a tract of ten acres; B, a carpenter, builds a house on it, and acquires a lien for the amount of his work, on the building and land on which it is erected, and C takes a subsequent mortgage on the whole. I see no good reason why the whole should not be sold together, and the proceeds applied to the encumbrances according to their priority.

True, a part of the land, not including the house, might bring enough to satisfy the first encumbrance. This would leave the residue of the land, including the house, for the carpenter and the subsequent mortgagee. If, in this state of things, the subsequent mortgagee could confine the carpenter to the house and the land it covered, the residue of the land would go to pay his mortgage, but it is plain this would sacrifice the carpenter's interest, and it cannot be the meaning of the act.

I think the true construction of the act will appear by supposing that no lien exists on the whole tract, except the carpenter's lien for the house built on it. In that case, what would be the extent of the carpenter's lien on the land on which the house was built? I think it would extend to so much of the land as, with the house, would pay the lien. If this be so, then, in the case put, after selling so much of the land as would pay A's mortgage, the residue of the land, with the house on it, might as well be sold together. If it brought no more than enough to pay the carpenter's lien, the subsequent mortgagee could get nothing; if it brought more, he could have the surplus. It is also apparent, from this, that in the case put, the whole tract might as well be sold together, and the surplus, after paying A's mortgage, be applied, first, to pay the carpenter, and the surplus beyond that, if any, to the subsequent mortgage.

It was said, in argument, that the carpenter would get a lien on the entire tract of land, as security for a house he might build on it. I see no reason why he should not, in good sense, and under the language of the act, have a lien on so much of the land, including the house, as will pay for building the



---

Wilson v. Ex'rs of Fisher.

---

house ; and unless you can confine him to the ground covered by the house, there can be no other rule.

In the case in hand, I am of opinion that the claims of Schoonmaker and Morrell & Post are liens on the buildings and on the tract on which they were erected, or so much thereof as will be necessary to pay them ; and that these liens are prior to the mortgages set up in the answers.

Order accordingly.

CITED in *Edwards v. Derrickson*, 4 *Dutch*. 47-71.

---

JOSEPH D. WILSON v. DAVID FISHER AND GEORGE ROBBINS,  
EXECUTORS OF THE WILL OF JACOB FISHER, DECEASED.

1. A note given to a testator in his lifetime by one who was appointed a co-executor of his will, was inventoried by the two executors as a part of the assets of the estate ; and, in a joint account settled by the executors in the Orphans' Court, they charge themselves with cash received on the said note in full. *Held*, in the absence of any explanation, that both executors were liable to the residuary legatees for the whole balance struck against them in the said joint account.

2. A note given by one of the said executors to a legatee, on account of his share of the residue, which note was not paid, but which the other executor set up as a payment, was held to be no payment.

3. One of the executors paid four shares, in full, to four of five residuary legatees, and a part of the fifth share to the other legatee ; and on a bill filed by the latter against the executors for the residue of his share, set up that he had paid out all he had in his hands of the balance found by the said joint account, and that the other executor, who had since become bankrupt, had received enough of the said balance to pay what remained due the complainant. Is this a defence ?

4. It is not necessary to tender to executors a refunding bond before filing a bill for a legacy.

---

The bill was exhibited July 8th, 1845, by Joseph D. Wilson, against David Fisher and George Robbins, executors of the will of Jacob Fisher, who died February 1st, 1837, to recover from the executors the one-fourth part of the one-fifth part of the residue of the personal estate of the testator after paying debts and legacies ; the said residue having been bequeathed

---

Wilson v. Ex'rs of Fisher.

---

by the testator to his five children, in equal parts, and the complainant being one of four children of Margaret, a daughter of the testator, who died since the testator.

The bill states that the executors, in April, 1842, settled their account of the estate in the Orphans' Court of Monmouth county, in which they charge themselves with \$14,152.57½, and credit themselves with disbursements, \$200.51, and admit a balance in their hands of \$13,832.06½, after paying all the debts and specific legacies, to be disposed of agreeably to the will. That the said account was the joint account of the executors, and was sworn to by each of them, and was reported by the surrogate of Monmouth to the Orphans' Court of the county; and that the said court, in April, 1842, decreed that the same be allowed in all things.

The defendants answered separately.

David Fisher, in his answer, admits the account exhibited and settled by the executors in the Orphans' Court, as stated in the bill; and says that, by joining with his co-executor in having the account so stated and reported by the surrogate, it was not his intention to make himself chargeable for any more of the assets than had come to his hand, and that he was so advised by his counsel and believed, when he joined in the account; it being necessary to have their accounts so settled, to ascertain the general balance, to determine the respective shares of the residuary legatees. He says that \$11,158.81 of the balance of the said amount was received by him, and that it was fully laid out and disbursed to those entitled to receive it under the will; and that the residue of said balance, viz., \$2773.25, was received by Robbins; and that, of that sum, there is yet in Robbins' hands, as he believes, some \$1200 to be paid out and distributed under the will.

That he and Robbins have, at all times, kept separate accounts of the assets which have come to their hands respectively, and taken separate vouchers for their respective disbursements; and that he has fully paid out and disbursed all that came to his hands. That, on the 8th April, 1839, he paid to the complainant \$412, in part payment of his legacy, and took his receipt therefor. That the complainant has not, nor has any person for him, made any demand of him for any balance

---

Wilson v. Ex'rs of Fisher.

---

due the complainant on his legacy, or tendered any refunding bond to him, or made any offer of two sufficient securities, as required by law, before the filing of the bill, or at any other time; and he submits that the bill should be dismissed as against him; that after the accounts were settled, he paid out the balance of the estate in his hands to such of the legatees as demanded the same of him and tendered to him the sureties required by law.

That Robbins had sufficient assets in his hands to pay the balance of complainant's legacy, and that he expressly retained it for that purpose; and that when the complainant, in the fall of 1842, called on him, this defendant, to learn something in reference to the estate, he told the complainant he had disbursed all the assets that came to his hands, and that Robbins had the funds to pay the balance due him.

The answer of Robbins, the other executor, admits that he became possessed of personal estate, to the amount of the two several sums of \$2773.25 and \$296.12; and says that he paid, out of the same, in the administration of the estate, \$1831.68, including his commissions; leaving a balance in his hands, unapplied, and for which he is accountable, of \$1237.69. That he is insolvent, and that on the 8th February, 1845, he was declared a bankrupt, and has obtained a certificate of his discharge. He says that in joining in the accounts stated and reported by the surrogate, it was not his intention, nor, as he believes, the intention of his co-executor, to make themselves severally chargeable for more of the assets than had come to their hands severally; and that he was so advised by his counsel and believed, when he joined in the account; stating the object of their joining to have been as stated by Fisher in his answer.

He says that after Fisher had disbursed what was in his hands, he, Robbins, had \$1237.69 in his hands, which was sufficient to pay the balance due the complainant and the balance due the other children of Margaret; and that he took upon himself and promised to do it; but that he is unable to do it; that he and his co-executor have at all times kept separate accounts and taken separate vouchers. He denies demand or tender of refunding bond; and says that no decree of distribu-



---

Wilson v. Ex'rs of Fisher.

---

tion has been obtained against him and his co-executor in the said Orphans' Court, showing what portion of the personal estate came to the hands of him and his co-executor, or what were their respective disbursements.

Replications were filed and proofs taken.

*P. Vredenburg*, for the complainant.

*D. Ryall* and *P. D. Vroom*, for defendants. They cited 1 *Halst. Rep.* 432; *Elmer's Dig.* 311, 317; 1 *P. Wms.* 81; 2 *Ves., Jr.*, 678; 4 *Ibid.* 596; 4 *Johns. Rep.* 23; 7 *Johns. Ch. Rep.* 17; *Bac. Ab.*, title "*Executors and Administrators*," *D.*

THE CHANCELLOR. Three joint accounts have been stated by the executors and presented to the Orphans' Court and allowed; the first in January, 1839; the second in April, 1841; and the third in April, 1842. In each the balance found in the hands of the executors is stated thus: "Balance in hands of accountants, to be disposed of agreeably to will of testator."

The balance found in their hands by the last account was \$13,932.06½.

Robbins was, in February, 1843, decreed to be bankrupt. The answer would seem to say that \$1237.69 of the balance of the said joint account of the executors was in the hands of Robbins. Fisher paid in full four of the five residuary legatees, each entitled to a fifth of the balance of the said joint account, and more than half of the remaining fifth.

If \$1237.69, or any other portion of the balance of the joint account of the executors was in the hands of Robbins, can Fisher, after paying four shares in full, relieve himself from the payment of the other share by paying half of it and showing that he has no more of the balance of the joint accounts in his hands, and that the other executor had received the residue of that balance?

This is a question which should be well considered before deciding it in the affirmative. It strikes me it would be a dangerous doctrine. But I am not satisfied that any part of the balance found by the joint account in the hands of the executors can, under the pleadings and proofs in the case, be consid-

---

Wilson v. Ex'rs of Fisher.

---

ered to be in the hands of Robbins, and not in the hands of Fisher. A note of Robbins to the testator, of about \$1500, was included in the inventory. In the second account of the executors, they charge themselves, "April 8th, 1839, cash received of George Robbins, on account of his note, \$600," and, "April 6th, 1840, cash received of George Robbins, in full of his note, \$984.50." I also find that certain debts due the estate, and which are included in the inventory, amounting, in all, at their appraised value, to \$1471.46, are not included in the balance struck in the joint account, and that no allowance is prayed for them as bad or doubtful debts. Whether Robbins had received them, and Fisher was, therefore, unwilling to have them charged in the joint account, does not appear. The charging themselves, in a joint account, with cash received of Robbins, in full of his note due the estate, no explanation of the charge being made in the case, makes both of the executors chargeable to the legatees for that amount, and, so far as it constitutes a part of the balance struck in the joint account, Fisher is liable for it.

In view of this, and of the fact that \$1471.46 of the assets of the estate is not included in the balance struck against the executors, and may, for aught that appears, be in the hands of Robbins, both the answers may be true, in the sense in which they have been sworn to, and yet the whole of the balance of the accounts, as stated and allowed, be in the hands of Fisher, charging him with the debt acknowledged in the joint account, to have been received from Robbins.

Fisher, in his answer, says that on the 8th of April, 1839, he paid to the complainant \$412, in part payment of his share of the residue of the personal estate, and took his receipt therefor. Two hundred dollars of this \$412 consisted of a note which Fisher procured to be given by Robbins to complainant, and which was never paid; and Fisher at that time had, or must be considered to have had in hand—he being liable, as before observed, for, or having actually received the amount of Robbins' note due the estate—the \$200 for which, instead of paying it in money to the complainant, he got Robbins to give his note to the complainant. This note was no payment by either of the defendants to the complainant, and the receipt taken

---

Ex'r of Cooper v. Cooper.

---

by Fisher from the complainant, for \$412, is, therefore, good only for \$212.

That no refunding bond was tendered before filing the bill, is no defence in this court. The court can provide, in the decree, for the giving of a refunding bond.

I am of opinion that both the executors are liable to the complainant for the balance remaining unpaid to him of his share of the residue of the personal estate of the testator, according to the amount of the said residue as ascertained by the said joint account of the executors.

Decree accordingly.

---

THE EXECUTOR OF NATHAN COOPER v. PRUDENCE COOPER  
AND OTHERS.

1. J. C. died March 15th, 1833, leaving a will, by which he ordered all his debts to be paid, and gave and bequeathed to his widow all his estate, real and personal, during her natural life or widowhood, and appointed her sole executrix thereof, the will containing no devise or bequest of the estate after her death. The testator left a grandson, his only heir-at-law. The widow and the grandson, and his family, occupied the dwelling-house and lands, and converted all the personal property to their own use. On the 24th of July, 1834 the widow, and the grandson and his wife, conveyed all the real estate to T B. S. On a bill by a creditor of the testator attacking the *bona fides* of the sale, and the answer and proofs in the cause, the deed was declared void, and the lands held liable for the complainant's debt.

2. On bill filed by a creditor of a testator, by bond signed by the testator and a surety, to set aside a sale of lands made by the executor and devisee, and to subject the lands to the payment of the bond debt, *held* that the surety was not a necessary party to the suit.

---

John Cooper died March 15th, 1833, leaving Prudence Cooper, his widow, and John S. Cooper, his grandson and only heir-at-law, and leaving a will, by which he ordered that all his just debts and funeral expenses should be duly paid and satisfied as soon as conveniently could be after his decease, and gave and bequeathed to the said Prudence all his real and personal estate during her natural life, or as long as she should re-



---

Ex'r of Cooper v. Cooper.

---

main his widow, and appointed the said Prudence sole executrix of his will, "giving or granting her full power and authority to act in and about the premises." At the time of his death he was seized in fee of certain lands in Morris county, described in the bill of complaint in this cause, and therein stated to be of the value of \$600, and possessed of some personal estate, but to what amount the complainant says he cannot state. It would seem from the pleadings in the cause that the value of the personal estate was about \$300.

At the time of the death of John Cooper, the executor of Nathan Cooper held the joint and several bond of John Cooper and Daniel Horton, dated June 2d, 1812, conditioned for the payment to the said Nathan, his executors, &c., of \$300, with interest, in one year, on which are several endorsements of interest received, the last of which is a receipt for one year's interest, dated June 3d, 1831. After the death of John Cooper, Prudence, his widow, and John A. Cooper, his heir-at-law, with his family, occupied the lands and dwelling-house of the testator, John A. Cooper and his family living with the widow, and the personal estate of the testator, consisting of household furniture and stock on the farm, being used in the family.

On the 24th July, 1834, Prudence Cooper and John A. Cooper and Mary, his wife, by their deed of that date, conveyed all the real estate of which the said testator died seized to Thomas B. Stout, for the consideration expressed in the deed of \$500, the deed giving a particular description of the lands, and adding, after the description, this clause: "being the whole of the lands of the said deceased, according to the last will and testament of the said John Cooper, deceased."

On the 9th October, 1834, Nathan A. Cooper, executor, &c., of Nathan Cooper, deceased, exhibited his bill on behalf of himself as such executor and of all other creditors of John Cooper, deceased, who shall come in and seek relief by and contribute to the expense of the suit, against Stout, Prudence Cooper and John A. Cooper, stating, among other things, that Prudence, combining with the said John A., had converted and disposed of all the personal property of the testator to her own use, without accounting in any way for the same; and that there were no assets, real or personal, of the testator remaining,

---

Ex'r of Cooper v. Cooper.

---

except the real estate described in the bill ; that Prudence and John A. are insolvent ; and that for the purpose of defrauding the complainant they did, by their deed dated July 24th, 1834, convey all the said lands to Stout ; that before and at the time of the conveyance, Stout had full knowledge of the debt due the complainant, and that the land so conveyed to him was the only property left of the estate of the said testator out of which the complainant could collect his debt ; that, as the complainant is informed and believes, it was talked of and contrived between the parties to said deed, before and at the time of its execution, that by means of the said conveyance the complainant would be defeated of collecting his debt out of the estate of John Cooper, deceased.

The bill charges that Stout took the deed with full knowledge of the will, and that the conveyance was made with a secret understanding with Stout for the purpose of defeating the creditors of John Cooper, the said testator ; that, as the complainant is informed and believes, no part of the consideration money was paid, and that it all still remains in the hands of Stout ; that about September 1st, 1834, the complainant gave notice to Stout not to pay over the consideration money to Prudence and John A., and requested that it might be applied towards discharging the debt due the complainant.

The bill prays that the said debt may be decreed to be a lien on the lands ; and that the said deed may be declared to be void as against the creditors of John Cooper, deceased, and that the said lands may be sold to pay the said debt and such other debts, &c. ; or, if the court should think it proper to confirm the deed to Stout, that Stout may be decreed to account for and pay over the fair value of the lands to the complainant and such other creditors as may be entitled to relief under the bill, towards their claims, and that Stout may be enjoined from paying to Prudence or John A. Cooper any moneys that may still be due from him on account of said lands, and that Stout, Prudence and John A. Cooper may be enjoined from making any further conveyance of the lands.

The injunction was granted.

Stout put in his separate answer. He admits that he has lately heard of the debt mentioned in the bill, and that the

---

Ex'r of Cooper v. Cooper.

---

principal, with some interest thereon, is still due. He admits that John Cooper died seized of several tracts of land, worth about \$500, which he believes to be a full, adequate and sufficient price for the same, and possessed of some personal property. He denies that Prudence and John A. Cooper have continued to receive the rents, issues and profits for any longer time than until the sale to him, on or about July 24th, 1834, except the use of the house and barn and the privilege of getting wood for fuel, as his tenants; and says that the profits of the premises and the crops raised on the same have been exclusively in him and his tenant, for his own use, without the control or interference of the said Prudence or John A. Cooper. That as to the allegations of the bill respecting the conversion of the assets by Prudence and John A. Cooper, the deficiency of assets, the insolvency of said Prudence and John A. Cooper, and their having promised to pay said debt, and their acknowledging that the real estate was bound for it in their hands, he has no particular information other than that contained in the bill.

That on or about July 24th, 1834, he bought the premises of Prudence and John A. Cooper, by deed of that date, duly acknowledged and recorded, for the consideration of \$500 paid and secured to be paid to said Prudence and John A. Cooper; that this was the full value of the premises, and that the sale thereof was a fair, open and *bona fide* sale, and with no view or intent on his part to defraud the creditors of the said Prudence and John A. Cooper, or either of them, or the creditors of said testator; that the \$500 was in part paid, and the remainder secured to be paid as follows: on the sale being made he drew three notes, one dated July 24th, 1834, to Prudence Cooper, for \$100, payable one day after date, which was, on the day it became due, fully satisfied, paid off and discharged to said Prudence; and a note drawn upon said sale and dated by mistake July 25th, 1834, but intended for the 24th, in favor of Prudence and John A. Cooper, for \$200, payable thirty days after date, with interest, which note, with the interest thereon, was by him fully and fairly also paid off and satisfied to John A. Cooper, on the 26th of August, 1834, and the two said notes by them given up to him and now in his possession, with the receipts and acknowledgments of payment endorsed thereon



---

Ex'r of Cooper v. Cooper.

---

may more fully appear; the remaining note was dated July 24th, 1834, drawn in favor of Prudence, payable eight months from date, with interest, for \$200, on which he did, on the 30th of August, 1834, pay to Prudence \$127.65, which is or ought to have been credited thereon, which note still remains in the custody of said Prudence, unless she has assigned it; so that on the 30th August, 1834, he had paid to Prudence and John A. Cooper the purchase money for the premises, except about \$72.35 and a small amount of interest thereon, which still remains in his hands unpaid, in obedience to the order of this court.

That immediately after the execution of said deed he entered into possession of the premises, put a tenant in possession of part thereof under him, and has taken the rents, issues and profits thereof to his own exclusive benefit, except the house and barn, which he has rented to Prudence and John A. Cooper for a valuable consideration, with privilege of fuel, as after stated, without any bargain or understanding with said Prudence or John A. Cooper that the sale was collusive, fraudulent, or a cover from the creditors of the said Prudence and John A. Cooper, or of either of them, or of their testator, John Cooper, or that they were to receive any advantage from said sale except the purchase money.

He denies that at the time of the conveyance of the premises to him, or of the agreement for the sale, he knew of the said debt from said John Cooper, deceased, to the complainant as executor of Nathan Cooper, or that the premises conveyed to him were the only assets out of which said debt could be paid. He denies that there was any such conversation or understanding between him and Prudence and John A. Cooper, or either of them, at the time of the execution of the deed or at any other time, about defeating the complainant of recovering said debt by means of said sale, and that such sale was for any such purpose as is pretended in the bill; and he says he is a *bona fide* purchaser of the premises for a full, fair and valuable consideration, without any notice of the demand now set up by the complainant in his bill.

He says that shortly after said conveyance to him, to wit, on or about July 28th, 1834, he entered into articles with said

---

Ex'r of Cooper v. Cooper.

---

Prudence and John A. Cooper, under seal, dated the day and year last mentioned, whereby, in consideration of fifteen dollars, he let to them the house and barn on the premises, with the privilege of using the old wood that had fallen down and remained on the lot below the house, to use as firewood, till the 1st of April, 1835; and that the said Prudence and John A. did, by said articles, promise and agree to yield up possession of said house and barn on the 1st of April, 1835, in as good repair as when they leased it, fire excepted; and he says that, except the use of said house and barn and the said privilege, neither Prudence nor John A. Cooper has or has had any control over or interest in the premises since the sale to him on the said 24th July, 1834; and that since the said 1st of April, 1835, he has leased the house and the whole premises to one Thomas Bowman, who now has possession of the same; and he says that he denies that there was any agreement or understanding, at the time of the sale or at any other time, by which he was to take the premises subject to the said debt, or any other debt, but that the sale was absolute and unconditional, without any reservation or secret trust whatever.

He submits that by no construction of the will is he, a *bona fide* purchaser, subject to the payment of the debts of the testator; and that it is manifest, from the whole will, that no lien is created thereby which can or ought to attach on his estate.

He admits that, on or about September 1st, 1834, he received a notice from the complainant, forbidding him to pay over any moneys that then were or might be due from him to Prudence and John A. Cooper, or either of them, on account of any lands that belonged to John Cooper, deceased, and that had been bought by him of Prudence and John A. Cooper; and he offers to pay into court the said sum of \$72.35, and the interest thereon, which was all the money due on account of said sale when he received the notice, and still remains due, to be disposed of by the court.

He submits that all the matters complained of are matters which may be determined at law, and with respect to which the complainant is not entitled to any relief in this court; the complainant not having any lien for the said debt on the said land since the alienation thereof to him; and he hopes he shall

---

Ex'r of Cooper v. Cooper.

---

have the same benefit of this defence as if he had demurred to the bill.

Prudence and John A. Cooper put in their joint and separate answer. They admit the giving the bond as stated in the bill, and that the principal of the bond and some interest thereon is still due, but what amount they cannot say; and that John Cooper died seized of several tracts of land, worth about \$500, and possessed of some personal property, worth about \$300.

They admit that they continued to receive the rents and profits till April 1st, 1835, and also that it was the express agreement between Stout and them that the profits of the premises and the crops should be exclusively in them, for their benefit, until April 1st, 1835.

They admit that Prudence has converted and disposed of all the personal estate, and that they are insolvent, not having property enough to pay their debts.

They admit that by deed of July 24th, 1834, for \$500 promised to be paid them by Stout, they conveyed the lands to him. That Stout promised to pay them \$100 at the execution of the deed, \$200 in eight months, and \$200 in one year thereafter. That he did not pay the \$100 at the execution of the deed, nor has he since paid it, but that he paid to Prudence, in cash and store trade, at different times, in all about \$40; and also that he wanted to offset a demand he had against John A. Cooper, of about \$47, leaving a balance of about \$13, of the \$100, yet due. That he never gave a note for the \$100, or any part of it, but refused to do so. That on the day of the sale he gave two notes for \$200 each, one payable in eight months, and the other in one year. That after the subpoena in this cause was served on the defendants, Stout called on Prudence and requested her to give him a receipt for some money, and to let him have one of the said \$200 notes, promising to return it and give up the said receipt, saying he would yet pay her all the money; that he only wanted to use them for the purpose of filing in chancery on Cooper's bill. That he has not paid any part of the \$400 mentioned in the notes, nor has he returned the said note, or the said receipt, but has since promised John A. Cooper the whole of the money if he would not come out against him.



---

EX'r of Cooper v. Cooper.

---

They admit that, at the time of the conveyance to Stout, and at the time of the agreement for the sale, Stout knew of the said debt due on said bond or otherwise from John Cooper, deceased, and that the lands so conveyed to him were the only assets out of which it could be paid; and that it was mentioned and contrived between them and Stout, before and at the time of executing the deed, as charged in the bill.

They admit and say that the receipt given by Prudence to Stout was dated some time previous to the time it was given, and that Stout said it must be so to make it appear that the money was paid before the notice of the injunction was served.

Testimony was taken, and the cause brought to hearing on the pleadings and proofs.

*H. W. Green and P. D. Vroom*, for the complainant.

*J. J. Scofield and B. Williamson*, for the defendants.

**THE CHANCELLOR.** So far as relates to the defendants, Prudence and John A. Cooper, the cause is free from difficulty. Prudence was devisee and legatee for life or widowhood, of the whole estate, real and personal, and executrix of the will. If she, the executrix, instead of applying the personal estate to the payment of the debts, converted it to her own use, the court could have no hesitation in subjecting her interest in the real estate under the will of which she was executrix, to the payment of the debts which she ought to have paid out of the personal property.

John A. Cooper, as heir-at-law of John Cooper, deceased, is entitled to the remainder in the real estate of said deceased, after the life estate therein given by the will to Prudence Cooper; and on the death of Prudence would, as next of kin to the testator, be entitled to the personal estate that remained after the payment of the debts of John A. Cooper, deceased.

John A. Cooper must be taken, from his answer, to have connived at or consented to the conversion by the executrix to her own use of the personal estate, and to have joined in the deed to Stout for the purpose of putting the real estate beyond the reach of the creditors of the testator.

---

Ex'r of Cooper v. Cooper.

---

In reference to Stout, so far as the consideration money remains unpaid by him to the grantors in the deed, it is a fit case for the interposition of this court to prevent it from going into the hands of Prudence and John A. Cooper, who admit themselves to be insolvent.

But the case opens a wider range of inquiry. Several questions were started in the argument, on which I shall do no more than intimate, shortly, my impressions, as I think the case may be decided without considering them fully.

The will does not charge the land with the payment of the debts, in exoneration of the personal estate. The personal estate was primarily liable for the payment of the debts. If the personal estate was insufficient to pay the debts, it seems to me that the only safe course for the executrix, under the will, would have been to take the ordinary steps before the Orphans' Court to obtain a decree for the sale of lands to pay debts. But I do not think it necessary to examine particularly the question, somewhat considered in the argument, whether this will authorized the executrix to sell lands to pay debts. I think it is obvious that the conveyance to Stout was made by Prudence Cooper, in her character of devisee of a life estate in the lands, and by John A. Cooper as heir-at-law of the remainder.

Under the answer of Prudence and John A. Cooper, admitting the conversion of the personal estate by Prudence, and the insolvency of both of them, and the design on their part to put the real estate beyond the reach of the creditors of the testator, the case must be considered in the same light as if the personal and real estate had been given to Prudence absolutely and in fee, and she appointed executrix.

It is a different case from that of an intestacy and administration and a sale by the heir not being administrator; and is different, also, from the case of a will of real and personal estate devising the land to one and appointing another executor. It is the case of a will devising and bequeathing all the real and personal estate of the testator to one person, and appointing that person executrix of the will, and a purchase of the land from that person as the devisee thereof, no order for the sale of lands to pay debts having been obtained or applied for. In such a case, if the executor, in breach of his duty, converts the per-

---

Ex'r of Cooper v. Cooper.

---

sonal property to his own use, instead of applying it to the payment of debts, the lands devised to him could certainly be subjected, in his hands, to the payment of the debts. And in such a case a conveyance of the land by the devisee, she being executrix also, to another, should, in justice to the rights of creditors, be carefully scrutinized. I will not inquire whether, under such circumstances, a purchaser of the land can be a *bona fide* purchaser; but whether, under the proofs in the cause, Stout can be held to be a *bona fide* purchaser.

I think there is no doubt that a creditor may come into this court to test the *bona fides* of such a sale, and to ask that the conveyance be decreed void. Was this sale, then, a *bona fide* transaction? or is Stout chargeable, under the evidence, as a party to the design of the executrix and devisee and of the heir, as admitted by them, to defeat a resort by the creditors of the testator to the land for the payment of their debts? If he is, it will be the duty of the court to declare the conveyance void, or to subject the lands to the payment of the debts, though Stout should have paid the consideration. Whether it has been paid, or how much of it, is one of the questions in the cause.

Stout is chargeable with knowledge of the will and of the provisions of it. The devisee under the will is a grantor in the deed to Stout, and the deed refers to the will. He is chargeable, then, with knowledge that the devisee conveying to him was the sole executrix of the will, and bound to apply the personal estate to the payment of debts, and, if that was insufficient, to take means to have the land sold for the payment of the debts; and with knowledge that if the executrix and devisee had wasted the personal property or converted it to her own use, the lands devised to her by the same will might be subjected in her hands to the payment of the debts.

Beyond this, I think that, by testimony in the cause clearly competent, Stout is charged with knowledge of the existence of the debt to Nathan Cooper's estate; and that at the time the deed was made to him it was unpaid; and that the personal property was insufficient to pay the debts; and that the executrix had failed to apply even what there was towards the payment of the debts.

It is difficult to understand how Stout, with the knowledge of



---

Ex'r of Cooper v. Cooper.

---

these several matters, could have agreed to buy the land, unless the price agreed upon was so low as to induce him to assume the risk, or unless he bought with a view to aid the grantors in defeating the creditors from subjecting the lands to the payment of the debts, or was influenced by both these considerations.

From evidence free from objection as to competency, it appears that the land was worth a third more than the price agreed upon; and that Stout undertook to *befriend* the devisee and executrix in the matter, to use his own expression made to the witness Young. But, in addition to the matters above stated, of which Stout is chargeable with knowledge, we may derive aid in coming to a satisfactory conclusion by inquiring what Stout gave in consideration for the deed, by way of securing the purchase money; and what was the position of things at the time of the filing of the complainant's bill and the service of the injunction on Stout not to pay the purchase money, and at the time when the complainant, previous to filing his bill, gave Stout notice not to pay over any money. This last-mentioned notice Stout admits was given about September 1st, 1834; and the complainant's bill was filed October 9th, 1834, and the injunction served shortly after.

Stout, in his answer, says, or must be taken as intending to say, (the language in the answer in this respect is studied and peculiar,) that at the delivery of the deed to him, he gave three notes; one dated July 24th, 1834, to Prudence Cooper, for \$100, payable one day after date; one dated, by mistake, July 25th, 1834, but intended for July 24th, in favor of Prudence and John A. Cooper, for \$200, payable in thirty days, with interest; and one dated July 24th, 1834, to Prudence Cooper, for \$200, payable in eight months, with interest; the whole consideration money being \$500. Now it appears clearly, by the testimony of Henry Hilliard, that one of the notes given by Stout was for \$200, payable in *one year*. And Stout himself, in the bill filed by him against Nathan A. Cooper and Henry Hilliard, on the 2d July, 1836, says that on the execution of the deed from Prudence and John A. Cooper to him, on the 24th July, 1834, he made and delivered to them his note of that date for \$200, part of the consideration money, paya-

---

Ex'r of Cooper v. Cooper.

---

ble twelve months after date. Both Stout's answer and the answer of the Coopers, concur that a note for \$200 of the consideration money was given, payable in eight months. It is sufficiently clear, then, even without the answer of the Coopers—though I see no objection to considering that, in reference to this matter, at least—that at the giving of the deed, two notes, of \$200 each, were given by Stout, one payable in eight months and the other in a year. It follows that no note of \$200 was then given, payable in thirty days, for the whole consideration money was but \$500.

Stout's answer, if it is to be taken as saying that a thirty days' note, for \$200, was given at the time of the sale, is not according to the fact. This is a very controlling consideration in the case. Two notes, for \$200 each—*i. e.*, for \$400 of the said consideration money—were given, both dated July 24th, 1834, one payable in eight months and the other in a year. There is now exhibited on the part of Stout, a note dated July 25th, 1834, to Prudence and John A. Cooper, for \$200, at thirty days, with interest. This note must have been substituted for one of the other two \$200 notes.

When was this done, and for what purpose? Was it done on the day of the sale? Why make any change, then, in the notes? If Stout, after giving the other notes, thought he could pay \$200 in thirty days, was he so apprehensive that the money would not be received before it was due, that he insisted on changing one of the \$200 notes to a thirty days' note? Was this change made before Stout was served with the injunction, or before he received the notice from the complainant, before referred to, given September 1st, 1834?

Three receipts are produced, one signed by Prudence Cooper, on the back of a note made by Stout, dated July 24th, 1834, to Prudence Cooper, for \$100, payable one day after date, which receipt is dated July 26th, 1834, and is in full for the note; another of the receipts is on the back of the thirty days' note, and is dated August 26th, 1834; and the third receipt is a loose receipt, signed by Prudence Cooper, for \$127.65, to be credited "on a certain note held by her against Stout, for the sale of land." This receipt is dated August 30th, 1834. All three of these receipts are dated of days prior to the 1st of September.

---

Ex'r of Cooper v. Cooper.

---

There is a singularity in this matter, well calculated to induce a severe scrutiny of the transaction; and I feel that I am in very little danger of coming to a wrong conclusion, in saying that these papers were not made till after the 1st of September, and, perhaps, not till after the injunction was served. If I am right in this, the next question is, for what purpose was the change made in the note of \$200, and for what purpose were the receipts given? It could only be for the purpose of making a case against the complainant, and this was an object in which the executrix, at that time, from the admissions in her answer, would naturally join.

Did Stout pay the moneys for which these receipts were given? If the change in the note was made for a purpose, and evidence of the payment of it was necessary, for the same purpose, and both parties were acting with a common design, very little reliance is to be placed on the receipts, as evidence of actual payment of the moneys. But if, as I think sufficiently appears, this change in the note and these receipts were not made till after September 1st, 1834, then Stout paid, after sufficient notice to put him on inquiry, and the payment, after notice, and the giving and taking receipts dated of a day prior to the notice, is, of itself, strong evidence of bad faith in the original matter of the sale and purchase.

In a case like this, where the devisee making the deed was also executrix of the will, and as such, if the personal estate was insufficient to pay, should have applied for an order to sell land to pay the debts, but omits to do it within the year, and then, as devisee, makes a deed for the lands to another, and has not even applied what personal estate there was, towards paying the debts, but has converted it to her own use, there is a clear breach of duty and want of good faith in the devisee and executrix in making the sale or deed, and the court should be well satisfied of the *bona fides* of the grantee in taking the deed. In this case, the circumstances and proofs, even without the aid of the testimony of Mrs. Cooper and Mrs. Stout, which was objected to as incompetent, are too strong evidence of the bad faith of Stout to permit the lands, and the value of them, to be withdrawn from the creditors of the testator.

But I can see no objection to the testimony of Mrs. John A.



---

Ex'r of Cooper v. Cooper.

---

Cooper ; and if that be admitted it shows that Stout got from Mrs. Prudence Cooper one of the original \$200 notes and a loose receipt besides, after the injunction had been served on him. Her testimony, altogether, goes to show that the exchange of notes and the taking of the receipts was to enable Stout to make an answer to the bill.

As to the testimony of Mrs. Stout, it may be that some parts of it should be excluded, on the ground that, at the time of the transaction she speaks of, she was the wife of Stout. But there are some parts of her testimony which, it seems to me, would not fall within that rule ; and inasmuch as I do not think her testimony essential to the conclusion at which I have arrived, I do not think it necessary to examine particularly the admissibility of the different parts of her evidence. Nor do I see that in a case like this the answer of the Coopers is to have no weight. The bill charges the Coopers and Stout with a common design, by the conveyance of the property to Stout, to defeat the creditors, and it puts them all to answer. The Coopers admit it. This is certainly evidence that they, the Coopers, had such a design ; and this design on their part furnishes a reason why they might be willing to sign their names to receipts to be used by Stout in aid of their design. But, to proceed a step further, if a bill charging such a design between a grantor and grantee charges that no money was paid, and the grantor admits it, and the grantee says there was, may not the admission of the grantor be considered by the court, in aid of other facts and circumstances going to discredit the answer of the grantee ? I think it may. The grantor was bound to answer the bill, as well as the grantee. The answers will agree or disagree. If the grantee says there was money paid, and the grantor admits there was none paid, certainly the case is not so strong in support of the deed as if both had answered that the money was paid. In weighing the testimony as to the fact, this disagreement may be put in the scale.

I have gone carefully over the answers and the testimony in the cause, and I am constrained to say that it appears strongly to me that the case made by the bill is sustained.

As to the objection that Daniel Horton's representatives should have been made parties, I do not think it is well taken. It is

---

Brisley v. Jones.

---

evident he was but a surety on the bond, and this is a bill to subject the lands that were of the principal obligor to the payment of the debt.

On the whole, I think the deed must be declared void, and the lands held liable for the payment of the debt.

---

## BRISLEY v. JONES.

A having recovered a judgment at law against B and issued execution, which was returned "no goods or lands," filed a creditor's bill against B, which, after answer, was dismissed with costs. *Held* that the judgment at law could not be set off against the costs of B on the creditor's bill.

---

Brisley recovered a judgment at law against Jones, and issued execution thereon, which was returned "no goods or lands," and thereupon filed a creditor's bill against Jones, which, after answer, was dismissed with costs.

Brisley now moved that his judgment at law be set off against these costs.

*P. D. Vroom*, for the motion, cited 13 *Wend.* 649 ; 16 *Ibid.* 446 ; 1 *John. Ch. Rep.* 91 ; 6 *Ibid.* 317 ; 3 *Halst. Rep.* 172.

*S. R. Grover*, *contra*, cited 2 *Bl. Rep.* 869 ; 2 *N. Y. Tern Rep.* 105 ; 1 *Paige* 622.

THE CHANCELLOR. The bill goes on a charge of fraud, a charge that the defendant has property, which he secretes, and refuses to apply to the payment of his debts, and calls for an answer and discovery.

If there is no ground for such a charge, the defendant should not be subjected to the payment to his solicitor of the costs of resisting it. Mere experiment by the creditor would be encouraged if his judgment at law would protect him against the payment of costs to the defendant.

Motion denied.

---

Bayles v. Staats.

---

SARAH BAYLES, WIFE OF WILLIAM BAYLES, BY HER NEXT  
FRIEND, v. ISAAC STAATS.

A trustee who, from long-continued intemperance, has become unfit to have the charge of the trust property, will be removed, and a new trustee will be appointed.

The bill states that Abraham Staats, the complainant's father, since deceased, by his will, dated August 17th, 1819, did devise and bequeath, among other things, as follows: "Fourth, I give and bequeath all the other half of my farm whereon I live, to my five daughters, each share and share alike, their heirs and assigns. Seventh, my will is further, and I do order, that the legacy I left to my daughter Sarah, the wife of William Bayles, in this my last will, both real and personal, shall remain in the hands and possession of my executors hereafter named, and they to pay my daughter Sarah a reasonable support out of the same yearly, during the life of her husband, William Bayles; and after his decease she to occupy and possess the same as it is ordered in my will; but if she should die before her husband, William Bayles, and leave her child, in that case I do order the said legacy left as aforesaid shall remain in the hands of my executors, or the survivor of them, for the use of the child; if the child die before the age of eighteen years without issue, then the same to return to my estate and be divided according to law."

That Isaac Staats and John Frelinghuysen were appointed executors, and duly proved the will and took, &c. That Margaret, one of the testator's daughters, subsequently died leaving a will, dated August 30th, 1821, of which she appointed the said Isaac Staats executor, who proved the same and took, &c.; by which will of the said Margaret it was, among other things, provided as follows: "First, I give and bequeath all the land that comes to my share of my father's estate to my four sisters, all to share equal. Second, I give and bequeath to my sister Sarah one hundred and fifty dollars, with all my wearing apparel. Fifth, all the residue of my estate, after payment of debts, I give and devise to my brother and four sisters, equally



---

Bayles v. Staats.

---

to be divided among them, share and share alike. All that part of my estate that I give to my sister Sarah is to remain in the hands of my executor or his executors and administrators, the income of it for her use during the lifetime of her husband, William Bayles; and if he should die before her, then she to have full possession of it herself; if she should happen to die before her husband, William Bayles, it is my will that it should remain in the hands of my executor or his executors and administrators, for her child, until she arrives to the age of eighteen; if she should die before that time, leaving no issue, then it must be equally divided between my brother and sisters or their heirs."

That Bayles, the husband of the complainant, is still living, and her only child by him, now the wife of Cornelius Latourette. That John Frelinghuysen hath died, leaving the said Isaac Staats surviving executor and sole trustee of the property, real and personal, so given and bequeathed to the complainant by the will of said Abraham Staats. That the legacies so bequeathed to the complainant by the respective wills of the said Abraham and Margaret were in part invested in divers securities, to be applied as directed by the said wills. That the fund thus invested at present consists of a note of Reuben H. Freeman, with interest, for the sum of \$100; a note of Joseph Ross, with interest, for the sum of \$275; and a note of John H. Voorhees for the sum of \$375, with interest; which notes the complainant says she cannot now particularly describe, they being in the possession of the said Isaac Staats. That the said Isaac, owing to confirmed habits of intemperance and consequent imbecility of judgment, has become entirely unfit to execute the trusts created by the respective wills of the said Abraham and Margaret; and that he at times threatens to realize the said securities and apply the moneys thence arising to his own use.

That he has lately caused a suit to be instituted on the note of the said R. H. Freeman, constituting a part of the fund invested for the benefit of the complainant, and that she apprehends that if the said suit proceeds to judgment and execution, the said Isaac will enforce the payment thereof, and misapply the money. That the said note constitutes a safe and satisfactory investment, and that the suit for the recovery of the amount

---

Bayles v. Staats.

---

due thereon is brought against the express wishes of the complainant, and, as she believes, with the design of misapplying the proceeds thereof to the use of the said Isaac. That the said Isaac, in consequence of the conveyance of his real estate to his daughter and her heirs, and the sale of his personal property and a judgment by confession to a large amount, a considerable part of which remains unpaid, is irresponsible and insolvent.

The bill prays that a fit and competent person may be appointed, in the place of the said Isaac Staats, to take charge of the real estate devised to the complainant by the said respective wills, and to manage the trust fund so invested for her use; and that the said notes and other assets, if any, constituting the said fund may be delivered over by the said Isaac to the person so to be appointed; and that the said Isaac may account, &c.; and that he may be enjoined from further proceeding in the said suit against Freeman, and from disposing of any of the said notes or assets by sale, assignment or otherwise.

On this bill an injunction was issued restraining Isaac Staats from further proceeding in the suit against Freeman on the said note given by him, and from prosecuting either of the other notes, until he should answer the bill and the court should make other order to the contrary; and the injunction was served on the 7th February, 1846. A subpoena, returnable to March Term, 1846, was also served on the same day.

At the June Term, 1846, the defendant having failed to appear, an order was made that the complainant proceed to take depositions, &c., and bring on the hearing of the cause *ex parte*.

John H. Voorhees testifies that he borrowed \$335 of John Frelinghuysen, executor of the will of Abraham Staats, deceased, and gave his note for it; that Isaac Staats has become a common drunkard; that he saw him pretty much every day the week before, and that he was very drunk every time, and stupefied with liquor; that he thinks Isaac Staats incompetent, from the life he has led, and his conduct, to have the management of the fund in question; that he, witness, has been a judge of the Common Pleas of Somerset between nine and ten years; that he supposes Isaac Staats to be a little rising fifty years old.

Mrs. Jane Doty, a sister of Isaac Staats, testifies that in

---

Bayles v. Staats.

---

January, 1846, (the bill was filed on the 30th of that month,) she heard Isaac say he meant to use the money, and, if that did not hold out, the lands of Sarah Bayles ; that she does not consider him capable of managing the fund in question, from habitual intemperance ; that the suit brought by Isaac against Freeman was against the wishes and desire of the complainant.

Mary Staats, a sister of Isaac, testifies to the unfitness of Isaac to manage the fund, by reason of his intemperance ; that she heard him say he meant to collect the money in Joseph Ross' hands, alleging that he was not punctual in paying the interest ; this was after he sued the note of Freeman ; Mrs. Bayles was satisfied with the investment in Ross' hands.

Caleb Morton, a judge of the Common Pleas of Somerset, testifies that he has known Isaac Staats nearly thirty-two years ; that for the last twenty-two years he seldom or never saw him sober ; he has the reputation of being habitually intemperate ; that he does not consider him a safe depository of money.

Caleb C. Brokaw testifies that he has known Isaac Staats over twenty years ; during the last ten or fifteen years, and perhaps longer, he has been habitually intemperate ; for the last few years he has considered him incompetent to manage any important business ; witness does not think that moneys belonging to others would be safe in his management and custody.

The will of Abraham Staats, and a certified copy of the will of Margaret Staats, were exhibited.

*Mr. Leupp*, for the complainant.

THE CHANCELLOR. The case made by the bill is sustained by the testimony. A new trustee will be appointed in the place of Isaac Staats ; and the account prayed by the bill directed to be taken ; and the trust fund ordered to be delivered and paid over to the new trustee.



---

Adm'r of Moore v. Adm'r of Poland.

---

THE ADMINISTRATOR OF LEWIS MOORE, DECEASED, v. THE  
ADMINISTRATOR OF CORNELIUS POLAND, DECEASED.

P. gave a mortgage to M., and afterwards married one of M.'s two daughters and only children. M. died intestate, leaving a widow and the said two daughters. The widow died shortly after. After the death of M. and the widow, H. married the other daughter, and she died without issue. H. then administered on M.'s personal estate, and filed a bill of foreclosure on the mortgage. *Held* that H., by administering on the estate of his deceased wife, would become entitled to her share of the amount due on the mortgage, without liability to account, but that no more of the mortgaged premises should be decreed to be sold than enough to pay the share of H.'s deceased wife.

---

Bill for foreclosure. Cornelius Poland gave a mortgage to Lewis Moore, dated April 3d, 1835, to secure \$1200, according to the condition of a bond, &c., in one year. Moore died intestate, in January, 1836, leaving a widow and two daughters, Jane and Ann, leaving no real estate, and very little personal property, except this bond and mortgage. Before the death of Moore, Poland married the daughter Jane.

The answer states that after the death of Moore, the widow and daughters consulted as to the expediency of taking out letters of administration, and agreed that, from the situation of the family and the nature of the property, it was unnecessary and inexpedient, and that it was agreed that the widow should receive the income of the property, consisting of little more than the interest on this bond and mortgage, during her life, and that at her death, the property should be equally divided between the two daughters, by whom the debts, if any, should be paid equally. That Thomas Hull, who afterwards married the daughter Ann, was informed of this arrangement. That under this arrangement, he, Poland, paid to the widow the year's interest, and loaned to her other sums of money, which he submits should be decreed to have been paid to her on account of her share and interest in the sum secured by the bond and mortgage. That the widow died in 1837, and that, from her death, Ann lived and made her home with Poland and his wife, till October, 1842, when she married Thomas Hull.

---

Adm'r of Moore v. Adm'r of Poland.

---

In January, 1844, Henry S. Lupardus took out letters of administration of the estate of Moore, and in March, 1844, filed his bill of foreclosure on the said mortgage. Ann Hull died without issue, in May, 1845.

Poland died after the suit was commenced, and before answering, and the answer is put in by the administrator of his estate.

The answer states that he, the administrator, has been informed and believes that Ann desired and requested that her part of the interest on the bond and mortgage should go on account of her board, while she was living and continued to live and board in Poland's family, and that, over and above such board, Poland, in the years 1837, 1838, 1839, and 1840, furnished articles and paid or advanced to or for the said Ann divers sums of money.

Poland died in September, 1844, leaving Jane, his widow, and several minor children. No administration was taken of the estate of the widow, or that of Mrs. Hull.

Testimony was taken touching the alleged agreement that the widow should receive the interest on the bond during her life, and as to whether Ann was to pay board while she lived at Poland's, or whether her services in the family were considered equivalent to her board, and also as to the property which Lewis Moore left besides this bond and mortgage.

*W. Patterson*, for complainant.

*W. H. Leupp*, for defendant.

**THE CHANCELLOR.** Poland, the mortgagor, as the husband of Jane, is entitled to her share of the money due on the mortgage. Hull, surviving husband of Ann, deceased, by administering on her estate, will be entitled to what, if anything, may be due on her share, without liability to account.

No more of the mortgaged premises should be ordered to be sold than will be sufficient to pay what, if anything, may be due from Poland on Ann's share.

A reference will be ordered to ascertain what, if anything, is due on Ann's share, and whether part of the mortgaged pre-

---

Ballentine v. Ballentine.

---

mises can be sold to pay it, with liberty to use the testimony already taken in the cause.

Hull should take out letters of administration of the estate of his deceased wife.

Order accordingly.

---

BALLENTINE v. BALLENTINE.

On bill by wife, by her next friend, against her husband, for alimony and maintenance, a motion on the part of the defendant that the complainant file security for costs, was denied.

—  
This was a bill by the wife, by her next friend, against the husband, for alimony and maintenance, and for the support of their child.

A. Whitehead, on the part of the defendant, moved that the complainant give security for costs, and relied on *Rev. Stat.* 925, § 11.

Wm. M. Scudder, *contra*.

THE CHANCELLOR. Under Sections 10 and 11 of *Rev. Stat.* 924, 925, the bill, I think, might be filed by the wife in her own name, without a next friend. I am not prepared to say that, in that case, the 11th section, providing that in any such suit it shall and may be lawful for the Chancellor, if applied for before answer filed, to order a bond to be given in one hundred dollars, by one or more sufficient freeholders, with condition to pay such costs as may be awarded to be paid to the defendant, is imperative. Even in suits by the wife for alimony, this court, in proper cases, makes an order on the husband to pay money for the wife's costs and expenses. In this case the next friend is admitted to be a freeholder, and no question is made as to his responsibility.

Motion denied.





---

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CAUSES

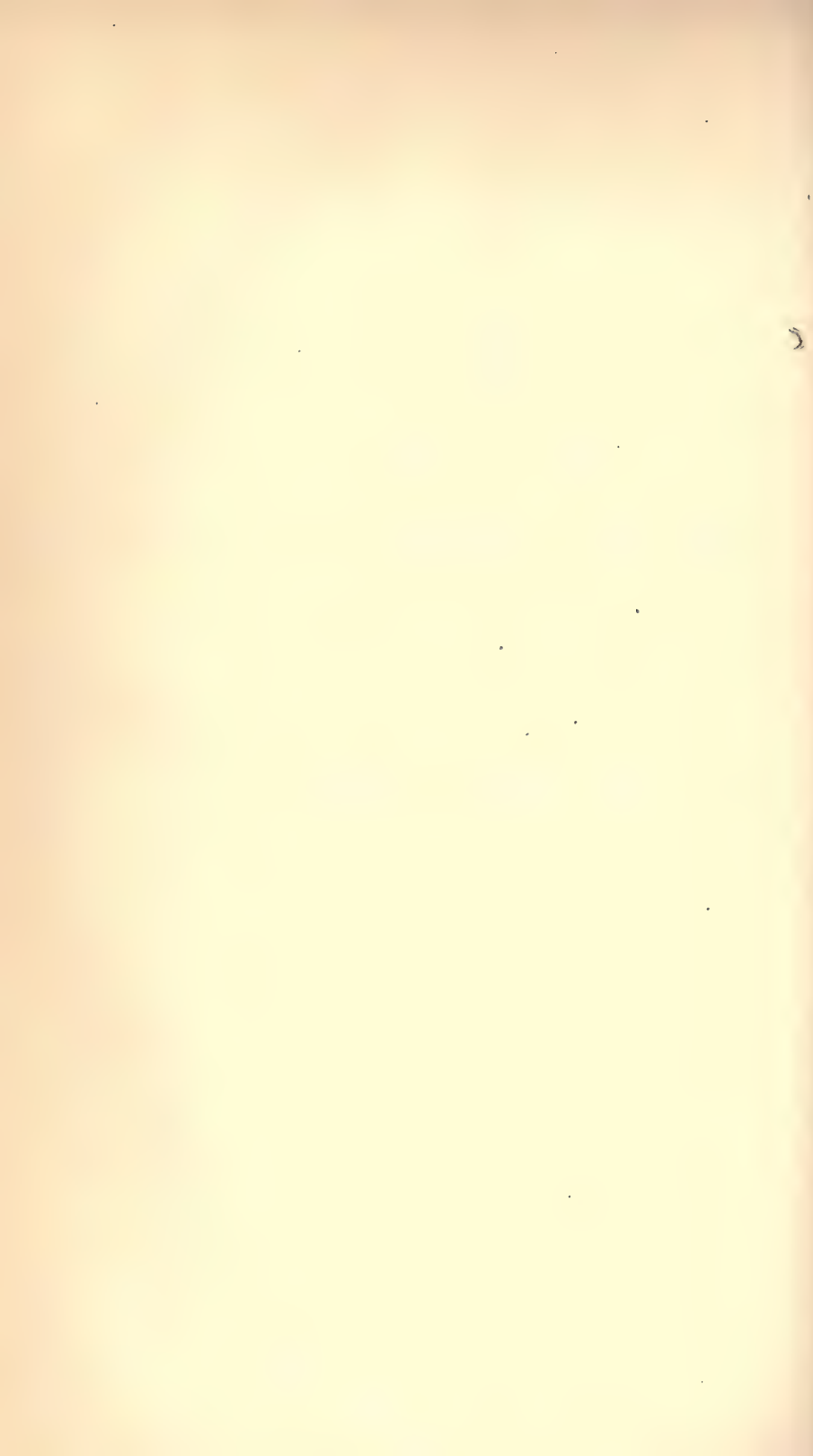
IN THE

STATE OF NEW JERSEY,

*ON APPEAL FROM THE COURT OF CHANCERY.*

---

GEORGE B. HALSTED,  
*REPORTER.*





These reports commence with the cases on appeal from the Court of Chancery determined in the Court of Errors and Appeals, as organized under the constitution of New Jersey agreed upon on the 29th of June, A. D. 1844, by a convention of delegates elected by the authority of an act of the legislature to prepare a constitution for the government of said state, to be submitted to the people for their ratification, and adopted by the people at an election held on the 15th of August, A. D. 1844.

The judges of the Court of Errors and Appeals are the Chancellor, the five justices of the Supreme Court, and six others, appointed judges of this court for a term of six years.

By a subsequent act of the legislature, the Chancellor, when he sits as a member, is the president of the court; in case of his absence, the Chief Justice of the Supreme Court; and in case of the absence of both of these officers, the senior in office of the justices of the Supreme Court who may be present.

The judges of the Court of Errors and Appeals at the commencement of these reports were :

OLIVER S. HALSTED, Chancellor.

JOSEPH C. HORNBLLOWER, Chief Justice of the  
Supreme Court.

JAMES S. NEVIUS,

IRA C. WHITEHEAD,

JOSEPH F. RANDOLPH,

THOMAS P. CARPENTER,

} Justices of the Su-  
preme Court.

JOSEPH PORTER, FERDINAND S. SCHENCK, JAMES SPEER, JONATHAN J. SPENCER, AARON ROBERTSON, JOSHUA BRICK,	}	Appointed Judges  of this Court.
--	---	--

The constitution required that these six appointed judges of this court should, immediately after the court should first assemble, arrange themselves in such manner that the seat of one of them should be vacated every year, in order that thereafter one judge might be annually appointed. The changes of the judges of this court, under this provision of the constitution and otherwise, will be noted as they occur.

The constitution provides that when an appeal from an order or decree in chancery shall be heard, the Chancellor shall not sit as a member, or have a voice in the hearing or final decision; but shall inform the court, in writing, of the reasons of his order or decree. In cases in equity, therefore, in this state, the appeal is from the Court of Chancery to the justices of the Supreme Court and the six appointed judges of the Court of Errors and Appeals.

In the first six cases reported, the present Chancellor sat, they being appeals from orders and decrees of former Chancellors.

# CASES

ADJUDGED IN THE

## COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

ON APPEAL FROM CHANCERY,

OCTOBER TERM, 1845.

---

FULGENCE CHEGARY, APPELLANT, v. JAMES J. SCOFIELD  
AND THOMAS L. KING, RESPONDENTS.

1. An appeal lies from an order dissolving an injunction.
  - 2 The appeal itself does not stay proceedings on the order appealed from.
  3. After appeal, the Court of Errors and Appeals may stay proceedings on the order appealed from, and this power extends to orders dissolving injunctions.
  4. An order of this court staying proceedings under an order dissolving an injunction which was appealed from, was, under the circumstances stated in this case, vacated at the next subsequent term.
- 

Fulgence Chegary, in August, 1844, exhibited his bill in the Court of Chancery, stating that, in 1839, he bought of J. R. Freeman a tract of land of about seventy acres, near the village of Madison, in Morris county, for the sum of \$3875, and gave to Freeman a mortgage thereon, for \$1400, part of the purchase money, on which mortgage, \$1000, with interest from April, 1844, remained due. That when he bought the said



---

Chegary v. Scofield.

---

land, there was an old dwelling-house and barn on it, much out of repair, and that the fences were in a state of decay. That he bought the said tract for the purpose of building a large house thereon, for a seminary on an extensive sale, and accordingly, in 1839, built such house thereon, at the cost of \$10,000, and that he expended on said tract, in fences and other improvements, about \$2000 more.

That after he bought the said land, he became indebted to "the president, directors, and company of the State Bank at Morris" in the sum of \$1500, to secure the payment of which, he, with Heloise D., his wife, gave to the said bank a mortgage on the said tract of land. That in 1843, the said bank, by J. J. Scofield, their solicitor, exhibited their bill in the Court of Chancery for the foreclosure of the said mortgage and the sale of the said tract, at which time he and his wife resided in the city of New York, where they have resided ever since. That in April, 1844, a decree was made in that suit for a sale of the mortgaged premises, and an execution for the sale thereof was delivered to Thomas L. King, sheriff of Morris county. That on the 12th August, 1844, the said sheriff sold the premises at Morristown, about three miles distant from the premises, in lump, for \$3400. That J. J. Scofield, the solicitor for the said bank, purchased the premises at the said sheriff's sale, but had not yet taken a deed from the sheriff. That he, Chegary, prior to the sale, and for some time afterwards, and until August 21st, 1844, had no knowledge that the sheriff had the execution, or that the premises were advertised for sale. That he took a newspaper, called "The Jerseyman," printed at Morristown, in which he supposed the sheriff would advertise the sale, whenever he intended to sell by virtue of any execution that might be issued upon the said decree, and that the sale was not advertised in the said newspaper.

That he, Chegary, long before, and at the time of the sale, had counsel engaged for him in his law business in New Jersey, namely, J. W. Miller and E. Whelpley, esquires, residing in Morristown, who knew nothing of the sale, and did not know that the sale was advertised, as he, Chegary, was informed.

That G. Desabay, his brother-in-law, who resided on the premises at the time of the sale, and had resided there for seven

---

Chegary v. Scofield.

---

ral years before, knew nothing of the sale, as he informed him, Chegary. That he, Chegary, had many acquaintances at Morristown, and in the neighborhood of the mortgages premises, who knew nothing of the sale, as he is given to understand, or that the premises were advertised for sale. That the sheriff never adjourned the sale, but sold on the first day appointed for the sale. That the premises were worth, at the time of the sale, \$10,000, and would have brought \$8000 at the sheriff's sale, if he, Chegary, had been apprised thereof. That it was his intention to have procured a purchaser of the premises whenever the sheriff should advertise the sale, and had a number of French gentlemen in view on whom he relied, being himself a Frenchman, who were able to purchase and save the property from being sacrificed. That the said farm or tract of land, reserving the said house built by him and two acres of ground adjoining thereto, is worth enough to satisfy the said two mortgages; and that the premises might have been sold in such manner as to save so great a loss as he must sustain if the sheriff's sale be allowed to stand. That the said sale, as he has been advised, and has reason to believe, was not duly advertised.

The bill prays relief against the said sale, and that new biddings be allowed; and that the sheriff be enjoined from delivering a deed to said Scofield.

On the 30th August, 1844, the injunction was allowed.

On the 14th January, 1845, on motion and argument, without answer, the injunction was dissolved.

Shortly after the dissolution of the injunction, and within the thirty days given to appeal, the sheriff made and delivered a deed for the premises.

On the 12th February, 1845, Chegary filed his petition of appeal in this court, appealing from the said order dissolving the injunction; and stating, as grounds for appeal, that the matters stated in his bill are sufficient to support the injunction; that the defendants have not answered the bill; and that, therefore, on the motion to dissolve the injunction, the matters stated in the bill were to be taken as true.

At the July Term, 1845, of this court, on motion in behalf of Chegary, this court made an order staying all proceedings under

---

Chegary v. Scofield.

---

and by virtue of or consequent upon the said sheriff's sale, until the determination of the appeal or this court make other order.

At the October Term, 1845, of this court, a motion was made on behalf of the appellees to vacate the last-mentioned order.

*J. J. Scofield* and *H. W. Green*, for the motion. They cited 3 *John. Rep.* 540, 547; 4 *Ibid.* 25, 510; 7 *John. Chan. Rep.* 295; 2 *Hoff. Ch. Pra.* 31, 32; 15 *Ves.* 185; 20 *Wend.* 590; 1 *Halst. Dig.* 239; 2 *Wend.* 137; 17 *Ves.* 380.

*S. Scudder* and *P. D. Vroom*, *contra*. They cited *Elm. Dig.* 63, No. 62; *Cranch*, 51; 1 *Green's Ch.* 182; 3 *Paige* 381, 386; *Ibid.* 213; *Eden on Injunc.* 229; 15 *Vesey* 180; 5 *Price* 468; 2 *Exch. Rep.* 279; 1 *Jac. and Walk.* 616; 14 *Ves.* 585; 9 *Paige* 502, 503.

HORNBLOWER, Chief Justice.

The great object of the complainant's bill was to set aside the sheriff's sale, and to have the premises re-sold, in the hope of a more advantageous one. This was a legitimate object, and one the complainant may attain, if his case is such as to entitle him to it. But, in order to accomplish this result, it was necessary for him to arrest the proceedings of the sheriff, and prevent him from delivering a deed to the purchaser. He therefore prayed that the Chancellor would grant an injunction restraining the sheriff from executing and delivering a deed for the premises to Mr. Scofield, the purchaser.

Upon perusing the complainant's bill, it seems the Chancellor thought an injunction ought to issue; and, accordingly, he enjoined the sheriff from executing or delivering a deed to the purchaser until the further order of the court. Soon afterwards, the defendants, upon notice, moved the Chancellor to dissolve the injunction, and after hearing the parties by their counsel, he made an order dissolving it. From this order the complainant appealed to this court, and at the last term, (and, as they say, by surprise, and in the absence of the respondents' counsel,) obtained an order of this court in the following words (*pro ut.*)

The respondents now move to vacate that order, as irregularly and unadvisedly made. Upon this motion, I consider the



---

Chegary v. Scofield.

---

whole question open before the court, whether *such an order* could lawfully be made by this court. But counsel have not only argued that question, but have discussed the expediency or justice of making any such order, if the court had authority to do so. The debate on this secondary question led unavoidably, at least to some extent, to an examination of the bill, and a discussion of the merits of the case, or, in other words, to an inquiry whether the appellant, by his bill of complaint, had entitled himself in equity to a writ of injunction.

Upon this latter question I do not mean to express any opinion. It will be time enough to do so when this appeal comes to be heard upon the merits. Whether the Chancellor committed an error in dissolving the injunction is a matter not now before this court. The simple question now to be decided is, whether *the order* made at the last term ought to be vacated; or, which is the very same thing, whether this court have any right to make *such an order* as the one entered at the last term?

That the Chancellor, after an appeal from his decision, may make a temporary order suspending the effects or the legal consequences of such decision, until the appeal can be heard; or, in case the Chancellor does not do so, that this court has power to restrain the party from proceeding to execute or act *under or in pursuance* of the Chancellor's decree, *or to do what that decree has simply left him at liberty to do*, I have no doubt.

The latter position seemed to be denied by the respondents' counsel, and, with great ability and learning, he pointed out the distinction between an appeal from an order of the Chancellor which *authorized*, or *created*, or *gave a right* to the party to *do*, or to *enjoy*, or to have something which, without such order or decree, he could not have done or enjoyed, and an order which simply left the party at liberty to act as he might have done if no bill had been filed, or no injunction had ever issued. In other words, between those cases where the party is proceeding to execute the decree, or is acting under an affirmative or specific authority given him by the decree, and those cases in which the Chancellor, by his order or decree, only sets the party free from any restraint and releases him to do what he might have done before bill filed. This is, no doubt, a plain distinction, and for some purposes may be a useful one, and

---

Chegary v. Scofield.

---

though, in the view I have taken of this case, it may not be necessary to examine the soundness of that distinction, or, rather, the use of it, as applied to this case, yet, that I may not be misapprehended, I feel bound to say that the distinction, though it exists in the mind, can have, in my opinion, no such practical influence in this case as counsel thinks it ought to have.

The argument is, that as the Chancellor only dissolved the injunction, the sheriff was at liberty to act just as he might have acted before the bill was filed. It was just as if no injunction had ever been issued; that he was not executing any decree; he was not proceeding *in* the cause; he was not doing anything for the doing of which he derived his authority from the Chancellor.

It seems to me the inconclusiveness of this argument must appear by simply asking the question whether, after this bill filed, and after the Chancellor had granted the injunction, the sheriff could have delivered the deed without the Chancellor's permission? Certainly he could not; and then it is by the authority and permission of the Court of Chancery, and in virtue of the Chancellor's judicial decision, that he acts in the matter and delivers the deed. It is this very decree that the appellant complains of in this court, and he comes here to get it reversed.

What is the difference between simply dissolving the injunction and dismissing the bill upon a final hearing?

If I file a bill claiming a tract of land, and get an injunction restraining the defendant from tearing down a house, or cutting down the timber, and while the injunction is in force, the cause comes to a hearing on the pleadings and proofs, and the Chancellor decides against my title and dismisses my bill, and thereupon the defendant renews his work of destruction, does he not do it by the authority and under the decree of the Chancellor? And if I appeal from that final decree, cannot this court interpose, and by an order in the nature of an injunction protect the property and restrain the defendant and all other persons acting or claiming under him from wasting and destroying the property? Would it be any answer to say it is the same as if no bill had ever been filed, and no injunction had

---

Chegary v. Scofield.

---

ever been issued against him ; or that he stands in the same situation as he did before suit brought, and is only doing what he had a right to do before any injunction was granted ? This argument would render an appeal utterly useless in every case of an injunction bill. A defendant might in every case after injunction dissolved, and even after appeal filed, destroy the property and defeat the substantial rights of the party. But the admission by counsel that the Chancellor, after a decree of dissolution, upon an appeal being filed, might by order renew, in effect, the injunction, in my opinion admits the right of this court to do so.

But I have put my decision on other grounds, and have said thus much only to preclude any conclusion that I have acted upon the distinction contended for by the respondents' counsel. I go upon the ground that the rule entered at the last term is *nugatory and useless*. If the sheriff has not delivered the deed the appellant does not want the rule, but he wants one in substance according to the prayer of his bill. He wants an order in the nature of an injunction restraining the sheriff from delivering the deed. If the sheriff has already delivered the deed, that order must fall to the ground as soon as we hear the appeal on the merits, whether we reverse or affirm the Chancellor's order. If we affirm, then we send the record back to him with our decree of affirmance, and nothing else. If, on the other hand, we reverse the Chancellor's decision, we must send the record back to him with our decree reversing his decision, and restoring the very same injunction which he erroneously dissolved. In either case, then, what becomes of this order respecting the action of ejectment ?

We must not forget that we are sitting here as a court of appeal. We can do nothing but review the particular order or decree appealed from, except that, where the Chancellor has, by his decree, given a party a right to a thing, we may restrain him from using it until we can hear the appeal on the merits ; or, where the Chancellor, by his decree, has loosened a man's hands, we may, by a preliminary order, tie them up again, until we can hear the appeal and determine whether he ought to be let loose or not. But surely we cannot, either before or after we hear the appeal, make a new and original order more



---

Chegary v. Scofield.

---

extensive than the scope of the complainant's bill, and more extensive, too, than the prayer of his bill. And, more especially, we cannot make an order upon a statement of facts not contained in the bill, and upon persons not parties to the bill.

To put this matter in a plainer light, if possible, we have only to ask ourselves this question : if this cause had been heard by the Chancellor on bill and answer, could we, on *this* bill, have made a decree that the Morris Bank, Alfred Ford and J. R. Freeman should not be at liberty to give the sheriff's deed in evidence upon the trial of the ejectment in Morris county ? This will not be pretended. Then, surely, we ought not to make a temporary order larger than the Chancellor can make after hearing the cause.

Let us look at this matter in another aspect. We are of opinion that the Chancellor was wrong in dissolving the injunction which restrained the sheriff from delivering the deed. We therefore reverse his decree and order that the injunction shall be reinstated and stand in full force. If, in addition to that order, which we remit to the Chancellor, we annex to it an order that certain persons, by name, who are lessors of the plaintiff in an action of ejectment, shall not use that deed on the trial of the cause, what sort of a record will the proceedings in chancery show when they come to be enrolled ? It will furnish a precedent of a new and original injunction issuing out of this court, against new parties, and upon new facts, and this, too, upon a mere appeal from a Chancellor's order dissolving a former injunction.

And yet, if we do not send this order to the Chancellor, what good will it do ? The very moment we have heard the appeal and sent the record back, the plaintiffs in ejectment may proceed, for the Chancellor certainly cannot restrain them, upon this bill, from using the deeds on the trials.

In every view I can take of this case, it seems to me this order is an extra-judicial proceeding, and ought to be vacated.

WHITEHEAD, J., CARPENTER, J., and Judges PORTER, SPENCER, SPEER, ROBERTSON and SCHENCK, concurred.

---

Chegary v. Scofield.

---

HALSTED, President.

This is not the occasion for expressing any opinion on the merits of the case made by the bill. The party supporting the order has had no opportunity of presenting to this court the question of the propriety of opening the biddings in this case. I shall consider the order which we are now asked to vacate as made in a case fit to be submitted to this court by appeal.

The power of this court, or of the Court of Chancery, to stay proceedings on an order appealed from, is not denied; and this power extends to orders dissolving injunctions. It was formerly held that an appeal from an order dissolving an injunction revived the injunction. But, by our present practice, an appeal from an order does not stay proceedings thereon without an order of the Court of Chancery, or of this court, for that purpose first had, and upon complying with such terms as the court making the order to stay proceedings may impose.

Is the case before us a case in which the power to stay proceedings should be exerted? I answer this question as if the deed had not been delivered. I think it is a case in which, if the deed had not been delivered, the Chancellor or this court should, in the exercise of a proper discretion, stay the delivery of the deed. And I am of opinion that the delivery of the deed by the sheriff, within the time allowed for taking an appeal from the order dissolving the injunction, the appeal having been taken within that time, has not taken the case away from the discretionary power of this court.

The purchaser was the solicitor of the complainant in the foreclosure suit, and is a party to the bill filed to set aside that sale. If he, immediately after the injunction was dissolved, apprehending an appeal and an application to the Chancellor or to this court to stay proceedings, went to his co-defendant, the sheriff, and obtained the deed, the Chancellor or this court could, I apprehend, give the effect to the appeal which might have been given to it if he had not obtained the deed. This was not denied on the argument. It was not denied that this court could lay its hand on the parties to the suit, so as to prevent them from making advantage from any act of their own in attempting to avoid the power of this court. In a gross case

---

Chegary v. Scofield.

---

this court would not suffer itself to be defeated of the exercise of its discretion. This tests the principle.

If, then, Mr. Scofield had thus got the deed and brought ejectment, this court could restrain him. This brings us to what his Honor, the Chief Justice, seems to consider a bar in our way; which is, that Scofield, as the Chief Justice seems to think appears, has made a deed to another, and that other has brought the ejectment. It seems to me that, before this court, sitting in equity, should stop at this, they should be well satisfied that it was not a bar put up by the party himself. Is it gravely alleged here that Scofield has sold the property? It was alleged by one of the counsel who argued in support of the order of the last term, that the sheriff had made a deed to one Ford, a brother-in-law of Scofield, though the property was struck off to Scofield; and on this the difficulty is started that a new party in interest has come in.

There is nothing before us to show that a new party in interest has come in; and, if a new party in name has been made, it may have been done solely with the intention of embarrassing the complainant in the apprehended motion to this court to stay proceedings. Counsel in this court will certainly agree that parties should stand openly here on their case as it really is, and not seek to evade the power of this court by a feigned movement. It must either be a feigned movement, or it must be supposed that, though the property was struck off to Scofield, he bid as the agent of Ford, and that the deed was therefore made to Ford.

The injunction was dissolved without answer, and no answer is yet in, and we are in the dark as to this matter. But if this last supposition be true that, though the property was struck off to Scofield, he bid for Ford, and, not letting his agency be known, the sheriff struck it off to Scofield, and so entered it in his memorandum of sale, and the complainant, under these circumstances, filed his bill against Scofield—he could do no otherwise, for he would not know that Ford had any interest in the matter—I presume it will not be contended that such a covert operation and the making the deed to Ford after the complainant's bill was filed, would defeat the complainant of any order which he would be entitled to if the deed had been



---

Peacock v. Ex'rs of Newbold.

---

made to Scofield ; to say nothing of the question whether the sheriff, under such circumstances, could legally make a deed to Ford.

There is nothing before us to enable us to act on any other ground than that Scofield bid and bought for himself ; nor anything to show that he has sold the property to Ford or any other person. If he bid as agent, there is nothing to show whose agent he was, whether Ford's or the bank's ; and if he bought as agent for the bank, the sheriff, certainly, could not make the deed to Ford.

There is nothing, in my judgment, in this newly started difficulty of a new party in interest having come in.

I am of opinion that the order of this court of the last term was right, and that it should not be vacated.

NEVIUS, J., and RANDOLPH, J., concurred in this opinion.

Order vacated.

CITED in *Landrum v. Knowles*, 8 C. E. Gr. 594.

---

LEVI PEACOCK AND LETTIS PEACOCK, HIS WIFE, SUING BY BENJAMIN R. PEACOCK, HER NEXT FRIEND, APPELLANTS, AND JOHN BLACK AND THOMAS BLACK, EXECUTORS OF DANIEL NEWBOLD, DECEASED, WHO WAS EXECUTOR OF JOHN HOLLINSHEAD, DECEASED, APPELLEES.

Where a bill for the recovery of a legacy bequeathed to a married woman was filed thirty-one years after the death of the testator, twenty-four years after the settlement of the estate, and seventeen years after the death of the executor, and no cause shown for the delay, the bill was dismissed on the ground of the presumption of the payment of the demand arising from the time which had passed after the right of action accrued before suit brought.

---

This case is reported in 3 *Green's Chan. Rep.* 61. It was argued before the Court of Errors and Appeals by *G. D. Wall*, for the appellants, who cited 2 *Story's Eq. Pl.*, § 61 ; 2 *Story's Eq.*, § 402 ; 2 *Kent's Com.* 235 ; 1 *Green's Chan. Rep.* 37 ; 2 *Ibid.* 267 ; 14 *Vesey* 469 ; 16 *Vesey* 413 ; 1

---

Peacock v. Ex'rs of Newbold.

---

*Green's Chan. Rep.* 429; *Ibid.* 37; *Story's Eq.*, § 1067; 5 *Vesey* 517; 10 *Vesey* 579; 2 *Vesey* 673; 5 *Johns. Chan. Rep.* 206; 2 *Story*, §§ 1405, 1406; 13 *Vesey* 6; 2 *Kent's Com.* 137, 138; 5 *Vesey* 514; 9 *Vesey* 173; 12 *Vesey* 413; 2 *Mad. Ch. R.* 153; 2 *Green's Ch. R.* 264, 516; 17 *Vesey* 96; 2 *P. Wms.* 144; 1 *Ibid.* 742; 3 *Bro. Chan. R.* 633; 1 *Chan. Cases* 20, 26; 2 *Ibid.* 5; 2 *Ventr.* 345; 3 *Bro. Chan.* 639, note; 2 *Story*, § 1367; 19 *Vesey* 641; 4 *Eq. Dig.* 366, §§ 7, 10; 4 *Ibid.* 242, §§ 1, 2; 2 *Vesey* 472; 1 *Johns. Chan. R.* 314; 1 *Atk.* 467; 1 *Coxe's Chan. R.* 28; 3 *Johns. Ch. R.* 216; 7 *Ibid.* 90; 2 *Ves., Jr.*, 943; *Cooper's Chan. R.* 205; 2 *Vesey* 12, 94; 3 *Johns. Chan. R.* 147.

*H. W. Green*, for the respondents, who cited *Saxton's Chan. R.* 690; *Atkinson* 28.

The decree of the Chancellor was unanimously affirmed, except as to costs; and as to costs, it was reversed.

# COURT OF ERRORS AND APPEALS.

JANUARY TERM, 1846.

---

ASHER WILLIAMSON, APPELLANT, AND WILLIAM H. JOHNSON AND JOHN T. NEELY, ADMINISTRATORS OF BENJAMIN JOHNSON, RESPONDENTS.

1. An executor, with power to sell lands, exposed the land for sale at public vendue, on the 11th March, 1789, and no person bidding what he thought a sufficient price, requested his son to bid for it, and he, accordingly, bid \$5.25 per acre. The executor postponed the sale on that bid, and gave notice that if any person would come forward and give more, he would sell the land to the person offering the best price, and that if no person offered a better price within a reasonable time, he would sell the same for the sum so bid by his son. No subsequent day was fixed upon for further biddings. On the 9th of August, 1792, the executor conveyed the land to his son, at the sum so bid by him, and the son, on the next day, re-conveyed the land to his father, the executor. No consideration passed, nor any security for any consideration, on either conveyance. The conveyances were set aside as fraudulent; and it was ordered that the land be sold under the direction of a master, and that the proceeds be brought into court.

2. The land was sold in 1812, under the direction of a master, and the proceeds brought into court. It was then ordered that the proceeds be paid to the executor, on his giving bond with surety, conditioned for the performance of the trust reposed in him by the will, (by which the proceeds were to be equally divided among the five sons of the testator, of whom the executor was one.) The executor, after receiving the proceeds, died, and administration of his personal estate was granted. In 1820, one of the five sons died, and the administrator of his personal estate caused a suit to be prosecuted against the surety on the said bond, to recover the share of the said deceased son; and in February, 1822, recovered final judgment for \$2202.46.



---

Williamson v. Adm'rs of Johnson.

---

Pending the said suit, by deed dated June 5th, 1821, the surety, with his wife, conveyed his real estate to his son and daughter; the condition expressed in the deed being \$10,000; the deed containing full covenants. This deed was acknowledged September 29th, 1821, and recorded October 1st, 1821. Execution was issued on the said judgment, and in May, 1823, all the right, title, and interest of the said surety in the real estate he had so conveyed, was sold by the sheriff on the said judgment against the surety, and the surety's said son and daughter bid \$3000 for the same, and it was struck off to them. The money was paid to the sheriff by them, or one of them; and the sheriff paid thereout, to the administrator of the said deceased son, the full fifth for which the said judgment had been obtained.

3. In March, 1824, the administrator of the executor and the said surety filed a bill of review, alleging errors in the decree setting aside the deed made by the executor in August, 1792; and setting up, on the part of the surety, that the executor had paid to the said deceased son, in April, 1792, a sum equal to a fifth part of the sum at which the land had been struck off by the executor to his son, in March, 1789, and had obtained the acquittance and discharge of the said deceased son for his share in full; and praying divers matters on the part of the said administrator of the executor; and praying, on the part of the surety, that the said judgment against him be set aside, and that the administrator of the said deceased son might repay to the said surety all moneys received by him over and above what should have been received by him for the share of the said deceased son.

4. To this bill a plea and demurrer were filed, which were allowed, on the 15th October, 1827; and an order was then made, giving leave to amend the said bill by striking out the name of the administrator of the executor as complainant, and the names of all the defendants except that of the administrator of the deceased son, and so much of the said bill as seeks a review of the said decree, so as to confine the object of the bill to the relief sought by the said surety against the said judgment and execution obtained against him on the said bond. On the 28th January, 1828, the surety filed his bill confining the relief he sought as directed in the said order. In October, 1843, upon the report of a master, (to whom the matter had been referred by an interlocutory decree,) stating that, on the 2d April, 1792, the executor had paid the said deceased son \$350.66, and that the excess of the judgment against the surety over the amount due at that time on the share of the said deceased son, with the interest on such excess, amounted to \$2256, a final decree was made by the Chancellor for that sum, against Asher Williamson; (he was the administrator of the deceased son;) and that execution issue therefor against the goods and chattels, lands and tenements, of the said Asher Williamson.

5. The decree was affirmed.

6. What proof held satisfactory of the existence, genuineness, and loss of a receipt or acquittance from the deceased son.

7. On the discovery, after a judgment against a surety, of a receipt dated in 1792, of which the surety had heard before the judgment was obtained, but which could not then be found; on bill filed by the surety, in 1824, after the judgment had been paid, it was decreed that the plaintiff in the

---

Williamson v. Adm'rs of Johnson.

---

judgment at law repay to the surety the excess of the judgment over what it should have been after deducting the amount of the receipt, with interest thereon from the date thereof, with interest on such excess from the date of the judgment.

---

William Williamson died in 1765, seized and possessed of a farm containing two hundred and ninety acres, leaving a will, dated June 20th, 1764, by which, after bequeathing a legacy of £33 to his wife, he ordered that she should have command of his plantation, household goods, stock of creatures and farming utensils during her widowhood; and that when she should marry or die, the executors of his will should take into their possession all his lands and personal property, and make sale thereof; and that out of the moneys thence arising, his executors should pay to his two daughters, Margaret Larue and Micha Williamson, £50 each; and that all the remainder should be equally divided among his sons, except that his son Abraham should have £100 more than either of his other sons; and appointed his sons, Cornelius Williamson and Samuel Williamson, executors of his will.

The testator left his widow and five sons, Cornelius, Samuel, John, William and Abraham, and his said two daughters.

Cornelius refused to prove the will; Samuel, on the 16th June, 1774, proved the will.

Samuel, on the 11th March, 1789, after advertising, &c., exposed the said farm for sale at public vendue, and no person bidding what he thought a sufficient price, he requested his son, Cornelius Williamson, Jr., to bid for the same, and he, accordingly, bid therefor 42 shillings per acre.

Samuel did not strike it off at that time, but postponed the sale on that bid, and gave notice that if any person would come forward and give more for the said lands, he would sell the same to the purchaser offering the best price, and that if no person offered a better price in a reasonable time, he would sell the same for the sum so bid by the said Cornelius Williamson, Jr., his son.

No person having offered a higher price, Samuel, on the 9th August, 1792, conveyed the said farm to his said son, for the said sum of forty-two shillings an acre so bid by him; and the said Cornelius, Jr., on the next day, reconveyed the said

---

Williamson v. Adm'rs of Johnson.

---

farm to the said Samuel. No consideration passed, nor any security for any consideration, on either conveyance.

Cornelius, son of the said testator, died in 1807, leaving a will, whereby, after making sundry other devises and bequests he gave and devised the residue of his estate, real and personal to his children, William, Cornelius, Asher, Joseph, Bernice, wife of Jacob Hoppock, Patience Williamson and Micha Williamson; and appointed his sons, William, Cornelius and Asher, executors of his will; and left his said children mentioned in his will all living.

On the 20th December, 1809, the children of Cornelius exhibited their bill in chancery, setting forth, &c., &c.; and praying that the deed upon the said sale, made by the said Samuel Williamson, as executor of the will of the testator, William Williamson, the elder, might be declared void; that the power of sale under the said will might be executed under the sanction and decree of the Court of Chancery, and the money thence arising be brought into court and distributed according to the said will; and that the said Samuel might account with the said complainants for the rents, issues and profits of the farm, and pay to the complainants their proportion, &c.

On the 10th July, 1810, the said Samuel filed his answer to the said bill.

A replication was filed and witnesses were examined.

On the 21st September, 1811, Joseph Bloomfield, Chancellor, made an interlocutory decree in the said cause, by which, among other things, he ordered, adjudged and decreed,

1. That the said pretended sale by the said Samuel Williamson to the said Cornelius Williamson, Jr., be, and the same is, thereby declared to be void, fraudulent and of no effect.

2. That the deeds of August 9th, 1792, from the said Samuel Williamson to his son, Cornelius Williamson, Jr., and from the said Cornelius Williamson, Jr., to the said Samuel are, and the same are thereby declared, void and fraudulent, and are altogether set aside and vacated.

3. That the said Samuel Williamson, executor of William Williamson, deceased, execute the trust reposed in him, by the sale of the real estate of the said testator. And, forasmuch as the said Samuel Williamson has been guilty of fraud



---

Williamson v. Adm'rs of Johnson.

---

in the premises it is ordered that he make the sale under the direction of James Linn, esquire, one of the masters of the court, who is hereby authorized to direct the said Samuel Williamson in all matters in relation to the advertising and selling the said premises, and the conditions on which the sale shall be made, to the best advantage of those concerned, and that the said master make report to the court when the sale shall have been made, and that the moneys arising therefrom, or the securities taken for the same, be brought into court.

4. That it be also referred to the said master to take an account of the rents, issues and profits of the said real estate from the time the said Samuel Williamson has had possession thereof, to wit, the 11th of March, 1789, until the time of the taking of the said account, and also of substantial and permanent improvements made by the said Samuel Williamson thereon, and that the master make report, &c. And all further questions and equity arising in the cause are reserved until the coming in of the master's report; particularly the questions of costs and the distribution of the proceeds.

In pursuance of the said decree, the master, on or about the 24th October, 1812, reported to the court, among other things, that the rents from the time the said Samuel Williamson had had possession, twenty-three years, amounted to \$2760, and that \$505 should be credited for improvements put on the farm by the said Samuel.

Exceptions having been taken to the said report, and submitted to the court, Aaron Ogden, Chancellor, in March, 1813, made an order confirming the said report.

In pursuance of the said interlocutory decree made on the 21st September, 1811, the said Samuel Williamson, as executor of the will of the said William Williamson, deceased, sold the said farm, under the direction of the said master, for \$7923.31; and the moneys thence arising, or the securities taken therefor, being brought into court, the said cause again came on to be heard before Chancellor Ogden, in September, 1813, upon the equity reserved and all questions thereon, and on the 22d October, 1813, it was by the said Chancellor ordered, adjudged and decreed that James Linn, esquire, the clerk of the court, should, without any further account, pay, from the

## Williamson v. Adm'rs of Johnson.

moneys in his hands arising from the sale of the said premises, to the executors or personal representatives of the said Cornelius Williamson, deceased, the one-fifth of the sum \$10,178.21, being the amount of the proceeds of the said sale and net rents of the said premises, after making the following deductions and allowances, to wit:

From the whole proceeds of said sales and net rents.....	\$10,178 21
Deduct, 1st. £100 devised by the testator, William Williamson, deceased, to his two daughters; £100 devised by the said testator to his son Abraham, with interest from 1792 to 1812, being twenty years; all which amount to.....	\$1,280 00
2d. The account of James Linn, Esq., for superintending the making the sales aforesaid .....	173 80
	<hr/> 1,453 80
	<hr/> \$8,724 41

Divide the remaining sum by five, which will give the one-fifth part, or share of the said Cornelius Williamson, deceased, amounting to..... 1,744 88

3d. From which deduct the proportion of the said Cornelius Williamson, deceased, of the sale first made by the said Samuel Williamson, which proportion he must be presumed to have paid, according to his answer, or settled in some other way, after a lapse of 20 years; which, with 20 years' interest, amounts to 523 33

Net amount due to the personal representatives of Cornelius Williamson..... \$1,221 55

Which sum of \$1221.55 was ordered, adjudged and decreed to be paid by the said James Linn, out of the moneys in his hands as aforesaid, to the executors or personal representatives of the said Cornelius Williamson, deceased, as assets of his estate. And it was further ordered that the said James Linn do pay, from the moneys in his hands as aforesaid, the costs of the said complainants to be taxed, and that he be allowed to retain in his hands \$173.80 for his charges in superintending the said sales.

## Williamson v. Adm'rs of Johnson.

And it was further ordered, adjudged and decreed that the said James Linn do pay over to the said defendant, Samuel Williamson, executor as aforesaid, the residue of the moneys arising from the said sales, upon security to be given by bond to the Governor and Chancellor of the state for the time being, in the penal sum of \$5000, conditioned for the faithful performance of the trust reposed in him by the will of the said testator, William Williamson, deceased, to be signed by him and one surety, to be approved by the said James Linn, who should make report of his doings therein and file the said bond on the files of the court.

On a petition for a re-hearing in the said cause, a re-hearing was ordered, and the cause came on to be re-heard on the 1st June, 1814; and, on the 11th of that month, it was, by William S. Pennington, Chancellor, ordered, adjudged and decreed, among other things, that the decree made by the late Chancellor, on the hearing of the said cause on the equity reserved, on the 22d of October, 1813, be altered, amended and rectified by striking therefrom the item whereby the sum of \$523.33 was directed to be deducted from the sum of \$1744.88; and that the said decree be in all other parts ratified and confirmed.

Of the moneys arising from the sale, so ordered to be brought into court, the said Linn, clerk of said court, acknowledged the receipt of \$6924.47.

Of the said sum, Linn paid to Asher Williamson, one of the executors of the said Cornelius William- son, deceased, pursuant to the decree.....	\$1,744 88
And paid the complainant's costs.....	202 23
And, after retaining his fees as master.....	173 80
And the fees allowed to him by law on the mo- ney paid into court .....	69 24

---

\$2,190 15

He paid, on the 25th June, 1814, to the said Samuel Williamson, executor of William Williamson, deceased, the sum of \$4734.32, the balance of the said sum of \$6924.47.

Whereupon the said Samuel Williamson, together with Benjamin Johnson as his surety approved by the said James Linn, executed and delivered a bond, dated June 25th, 1814, to William S. Pennington, Governor and Chancellor of the State of



---

Williamson v. Adm'rs of Johnson.

---

New Jersey, in the penal sum of \$5000, conditioned that the said Samuel Williamson should faithfully perform the trust reposed in him by the will of the said William Williamson, deceased, which bond was filed in the office of the clerk of the Court of Chancery.

On the 20th December, 1820, William Williamson, son of the testator, being dead, Asher Williamson applied for and obtained letters of administration of the estate of the said William Williamson the younger, deceased; and afterwards, as such administrator, caused an action to be commenced in the Supreme Court, in the name of William S. Pennington, late Governor and Chancellor, for the benefit of the said Asher as such administrator, against Benjamin Johnson, as survivor of said Samuel Williamson, deceased, who was then dead, for \$5000, and declared upon said bond given by said Samuel Williamson and Benjamin Johnson to the said William S. Pennington, Governor and Chancellor as aforesaid, in pursuance of the said decree of October 22d, 1813; and Johnson not having appeared or pleaded in said cause, a judgment by default was entered against him, in November, 1821, whereupon a writ of inquiry of damages was awarded, which was executed on the 25th February, 1822, and an inquisition finding \$2202.46 damages besides costs, made and returned with the said writ; and on the 27th of that month, final judgment was entered in the suit, against Johnson, for the penal sum of \$5000 debt, and \$49.30 costs; and the said Asher caused execution to be issued, in the name of the plaintiff in said cause, against the goods and lands of the said Benjamin Johnson, endorsed to levy the damages so assessed as aforesaid and costs, with interest from February 26th, 1822, which execution was delivered to Edward Welsted, sheriff of Hunterdon, on the 15th March, 1822, by virtue of which the said sheriff levied on three tracts of land; the first containing 170 acres, more or less, whereon Johnson resided; the second containing 218 acres, more or less, and the third being a tavern-house and lot of two acres at New Market.

Pending the said suit, by deed dated June 5th, 1821, Johnson, with his wife, conveyed all the said three tracts of land to William H. Johnson and Clarissa Johnson, his son and daughter; the consideration expressed in the deed being \$10,000, the deed

---

Williamson v. Adm'rs of Johnson.

---

containing full covenants. This deed was acknowledged September 21st, 1821, and recorded October 1st, 1821.

In May, 1823, the sheriff, under the said execution and levy, exposed the said three tracts of land for sale. He first tried to sell them separately, but no person appearing willing to bid for either of them in that way, he exposed them for sale all together, at one bidding, and the said William H. Johnson, for himself and his said sister, bid \$3000, and the lands were struck off to them.

The money was paid to the sheriff by them, or one of them, and the sheriff, out of the money, paid to Asher Williamson as administrator of the deceased son, William Williamson, the amount of the share of the said deceased son, for which the said judgment had been obtained.

Samuel Williamson, the executor, had died in 1821, and administration of his personal estate had been granted to Abraham R. Sutphen. On the 6th of March, 1824, Sutphen, as administrator of the said executor, and Johnson filed a bill of review, assigning errors in the said decree made by Chancellor Bloomfield, in 1811, and in the said decree made by Chancellor Ogden, in 1813, and in the said decree made by Chancellor William S. Pennington, in 1814, and praying that the said decrees might be reversed or corrected. Asher Williamson, Cornelius Williamson, and William Williamson were the defendants in this bill.

This bill also prayed, upon certain allegations made therein, that the executors of Cornelius Williamson, deceased, might come to an account with the said Sutphen, administrator of the said Samuel Williamson, touching the moneys received by them from, and to the use of the said Samuel, and might refund all moneys by them received, over and above what was justly due and ought to have been received by them, and touching other matters therein stated, and that the said judgment at law in favor of William S. Pennington, late governor, &c., to the use of the said Asher, as administrator of William Williamson, deceased, against Johnson, predicated upon the said decrees and the bond aforesaid, might be set aside, and that the said Asher Williamson might account touching the moneys so collected and received by him as administrator of

---

Williamson v. Adm'rs of Johnson.

---

William Williamson, the younger, deceased, and might repay all moneys so by him received, over and above what ought to have been demanded and received by him in the said action on the said bond against the said Johnson.

On the 13th of October, 1824, the defendants filed their plea and demurrer to the said bill. For plea, they say that the said cause in the bill mentioned, in which William Williamson, Cornelius Williamson, Asher Williamson, Joseph Williamson, Hop-pock and wife, Patience and Micha Williamson were complainants, and the said Samuel Williamson, defendant, came on to be heard in September, 1811, before Chancellor Bloomfield, when the said Chancellor made his decretal order as follows (setting out, at length, the said decretal order.) That James Linn, the master named in the said decretal order, on the 24th of October, 1812, made his report as follows (setting out the master's report at length.)

That the said report was confirmed by Chancellor Ogden, in March, 1813. That the said master, under whose direction the said real estate was sold, made his report of the said sale as follows (setting out the master's report of the sale.)

That the said cause came on for final hearing on the equities reserved, in September, 1813, before Chancellor Ogden, who, on the 22d of October, 1813, made his final decree as follows (setting out the said final decree at length.)

That the complainants, being dissatisfied with the said decree on the equity reserved, filed their petition for a re-hearing of the cause, on the matters in the said petition set forth, and a re-hearing of the cause having been ordered, the same came on to be re-heard, on the said petition, before Chancellor William S. Pennington, in June, 1814, who made his decree on the said re-hearing as follows (setting forth the decree at length.) And the defendants aver that the said decretal orders and final decree were duly signed by the Chancellor, on the — day of —, 18—, and entered, enrolled, and recorded according to law.

And these defendants, Asher Williamson, William Williamson, and Cornelius Williamson, do demur on the law of the said bill of review of the said complainants, and for causes of demurrer show that the said decree is free from the errors complained of.



That the said bill of review was filed without leave of the court first obtained ; without any affidavits verifying the truth of the facts contained therein, and without the complainants having made any deposit to answer the costs these defendants would incur thereupon.

That the said bill does not set out the decree complained of in such manner as the same should have been set out, but a long allegation of facts, some of which are charged to have existed before, and others to have happened since the making of the said decree, which are irrelevant and unfit to be introduced into a bill of review.

That Benjamin Johnson, one of the complainants, is a stranger to the decree complained of, being neither party nor privy thereto.

That the bill is multifarious ; several distinct matters having no connection with each other, and affecting the two complainants separately and distinctly, were inserted in the bill.

That Joseph Williamson, Patience Williamson and Micha Williamson, parties complainant to the decree sought to be reversed, and interested therein, are not made parties to the said bill.

Wherefore, and for divers other errors and imperfections appearing on the said bill, these defendants do demur, and pray that they may not be compelled further to answer the said bill ; that the enrolment of the said decree may not be opened ; and that the said bill of review may be dismissed, with costs.

*R. Stockton*, of counsel with the defendants.

The Chancellor having decided that the plea and demurrer be allowed, it was, on the 15th October, 1827, ordered by the Chancellor that leave be given to amend the bill of complaint by striking out the name of Abraham R. Sutphen, as a complainant, and William Williamson and Cornelius Williamson, as defendants, and also so much of the said bill as seeks a review of the decree between William Williamson and others, complainants, and Samuel Williamson, defendant, in the said bill mentioned and set forth, and all other irrelevant matter in the said bill contained ; so as to confine the object of the bill to the relief of Benjamin Johnson against a judgment and execution in the bill mentioned to have been obtained against him

---

Williamson v. Adm'rs of Johnson.

---

in the Supreme Court, by the said Asher Williamson, defendant in this cause, upon the said complainant paying to the defendant's solicitor the costs of the plea, demurrer and argument in this case, and amending the defendant's copy of the bill gratis.

On the 9th January, 1828, Benjamin Johnson filed his bill. The bill is entirely re-drawn, under the leave so given, and is in form an original bill, by Benjamin Johnson, complainant, against Asher Williamson, defendant.

The bill then states the will of William Williamson the elder, and the probate thereof by Samuel Williamson, (Cornelius, the other executor named therein, declining to act,) the exposing of the farm for sale by Samuel, in 1789, the striking it off to his son, the deed from Samuel to his said son, in August, 1792, and the reconveyance on the same day by his said son to him; alleges that on the 2d April, 1792, Samuel, the executor, paid to William Williamson, a son and devisee of his father, William Williamson, the testator, his share of the sum for which said farm had been so struck off by the executor to his son, and that the said William, the younger, thereupon executed to the said executor an acquittance and discharge in full for his share, dated April 2d, 1792; states the death of Cornelius Williamson, son of the testator, leaving a will devising his estate to his children, viz., William, Cornelius, Asher, and Joseph Williamson, Bernice, wife of Jacob Hoppock, Patience Williamson and Micha Williamson, and appointing his sons, Cornelius Williamson, Asher Williamson and William Williamson executors of his will; that these children, devisees and executors of Cornelius Williamson, deceased, on the 20th December, 1809, filed their bill against the said Samuel Williamson, executor of the will of William Williamson, the elder, praying that the said deeds from him to his said son and from his said son to him be set aside, and that the said real estate might be sold under the direction of the court, and that Samuel might account for the rents and profits thereof; setting out the answer and proceedings on that bill, and the decrees hereinbefore stated stating that Samuel Williamson, the executor, died about April 1st, 1821, intestate, and leaving very little property, and that no person administered on his estate until 1823, after the judgment against Johnson, when administration was grant-

---

Williamson v. Adm'rs of Johnson.

---

ed to Abraham R. Sutphen ; that William Williamson, son of William Williamson, the testator, having removed to the western country, where he died, Asher Williamson, on the 20th December, 1820, obtained letters of administration of the personal estate of said William Williamson the younger, deceased, and brought suit against the complainant Johnson on the said bond in which he was surety, as aforesaid, for the said Samuel as executor as aforesaid, in the name of William S. Pennington, Governor and Chancellor, for the use of the said Asher as administrator as aforesaid ; stating the judgment obtained against this complainant in that suit ; stating that the sheriff, by virtue of an execution issued on that judgment, advertised the property and estate of him, the complainant, Benjamin Johnson, on the 2d September, 1822 ; and that the said Asher Williamson bidding for the homestead farm of 170 acres the sum of \$1310, for the tavern house and lot \$405, and for another farm of 218 acres \$600, the same were struck off to him for the sums so bid, and the sheriff executed a deed to the said Asher, and delivered it to him ; that shortly afterwards a defect was discovered in the advertisement of the said property for sale, and the said sheriff, by the direction of the said Asher, again advertised the said property for sale, and, on the 14th May, 1823, again exposed the same for sale, and William H. Johnson and Clarissa Johnson bidding \$3000 for the said premises all together, the same were struck off to them for that price, and the sheriff conveyed it to them ; and that, out of the purchase money received of the said William and Clarissa, the sheriff paid to the said Asher Williamson, as administrator of the said William Williamson the younger, deceased, the whole amount of the debt, interest and costs on the said judgment and execution against the complainant, Benjamin Johnson.

The bill states that, at the commencement of the said suit against the complainant, and until after the judgment and execution and both the said sales had taken place and the said execution was paid off and satisfied, administration of the estate of the said Samuel Williamson had not been granted, and there was no personal representative of the said Samuel to investigate the state of his affairs, or having the custody or knowledge of his papers. That the complainant was ignorant of the claim of



---

Williamson v. Adm'rs of Johnson.

---

the said Asher Williamson, as administrator of said William Williamson the younger, deceased, against the said Samuel Williamson; that he had no access to, nor did he know where to find the papers of the said Samuel in relation to the said claim, or any documents or vouchers to enable him to contest or make any defence against the same. That he had heard that the said Samuel, in his lifetime, and in the lifetime of the said William Williamson the younger, had made a payment to the said William Williamson the younger, for or on account of his share of the estate of the said William Williamson the elder, deceased, and that there had been some receipt, acquittance or discharge for the same in the hands of the said Samuel Williamson, deceased, in his lifetime, but whether the same were yet in existence, or where or in whose custody the same was to be found, or by whom such payments could be proved, the complainant knew not. But he had also heard that the payment of the money and the existence of the receipt and discharge therefor were well known to the said Asher Williamson, who had repeatedly admitted the fact that a payment had been made, and after the commencement of the suit against this complainant, and before the execution of the writ of inquiry therein, he also admitted that there was only a balance of \$1000 or \$1200 due to the said William Williamson the younger, deceased, on his share, which was all he expected to recover of this complainant. That the complainant expected that the said Asher Williamson had made a correct calculation of the sum due after deducting the payment, and intended to claim no more; and not being able to deny his bond, and not being in possession of any evidence, or knowing where to obtain it, to prove the said payment, or ascertain the amount, and relying on the declaration of the said Asher that he only claimed the balance due after deducting said payment, the complainant did not undertake to contest the justice or amount of his claim.

That the said Asher Williamson, after the decease of the said Samuel Williamson, having gone to the house of Abraham Terhune, where the said Samuel died, and examined his papers remaining there, and finding that no such acquittance or discharge was among them, and supposing the same to be lost, and that no proof of such payment could be produced, fraudu-

---

Williamson v. Adm'rs of Johnson.

---

ently and deceitfully denied that any payment had been made, and did falsely and fraudulently conceal the same from the knowledge of the jurors of the said inquest, and did then and there exhibit, or cause to be exhibited, a claim for the whole amount of the share of the said William Williamson the younger, deceased, of the moneys arising from the second sale and net rents of the said farm, upon the footing of the before-mentioned decree of October, 1813, with the interest thereon, without allowing any credit for the said payment, the whole amount of which said claim was accordingly assessed and found for the plaintiff by the said inquest, he, the said Asher, well knowing, at the time, that such payment had been made and acquittance given, that the same ought to be credited, and that the sum so claimed and found was not due and owing by the said Samuel Williamson, as executor as aforesaid, to the said Asher, as administrator of the said William Williamson the younger, deceased; that the complainant, not being present at the said inquest, had no knowledge of the sum thus fraudulently claimed, and which was found by the said inquest, until after judgment was entered and execution issued thereon; that he was deceived and surprised by the conduct of the said Asher in the premises.

That after the appointment of the said Abraham R. Sutphen as administrator of the said Samuel Williamson, the complainant applied to him; that they searched among the papers left by the said Samuel at the place where he died, for the said receipt or discharge, but that the same could not be found; that they searched at other places where they supposed it might possibly be, but could not find the same until the 10th day of June, 1823, where they first discovered the same among some papers in possession of Peter I. Clark, esquire, into whose hands they had accidentally come after the decease of George C. Maxwell, esquire, who had had them in his hands in the lifetime of the said Samuel.

That the said receipt, acquittance, and discharge being dated the 2d day of April, 1792, given by the said William Williamson, the son and one of the devisees of the said William Williamson, deceased, to the said Samuel Williamson, deceased, for £131 10s., in full of his legacy or share of the moneys arising

---

Williamson v. Adm'rs of Johnson.

---

from the first sale of the farm of the said testator, hath since been mislaid or lost, so that the complainant is not able to produce the same in court, but hopes to be able to make satisfactory proof thereof.

That the said Asher Williamson, administrator as aforesaid, obtained the said judgment and execution against the complainant for a much larger sum than was actually due, by such fraud, deceit, concealment, and surprise upon the complainant, at a time when the complainant had it not in his power to prove the said payment by the production of said receipt, or to ascertain the amount thereof, and, having since discovered the said receipt, the complainant had well hoped that the said Asher Williamson would have come to an account and settlement with the complainant touching and concerning the moneys so recovered and received by him, as administrator of the said William Williamson the younger, deceased, of the complainant, and would have refunded to the complainant all the moneys so recovered, over and above what was justly due and owing, and ought to have been demanded and received by him on that account.

The bill prays that the said judgment at law, at the suit of the said William S. Pennington, late Governor and Chancellor, to the use of the said Asher Williamson, as administrator of the said William Williamson the younger, deceased, against the complainant, may be set aside and declared null and void, as obtained by fraud, surprise, and mistake, or that, notwithstanding such judgment, the said Asher may come to an account with the complainant touching and concerning the moneys collected and received by the said Asher, as aforesaid, upon such judgment, and that the said Asher Williamson may be decreed to refund and repay to the complainant all the moneys so recovered and received, over and above what was actually due and owing, and ought to have been recovered in said action for the share of the said William Williamson the younger, deceased, in the proceeds of the second sale and net rents of the said farm, after deducting the sum so paid by the said Samuel Williamson to the said William Williamson the younger, deceased, in his lifetime, for his share of the moneys arising from the first sale.



Subpœna is prayed, to be directed to the said Asher Williamson.

On the 12th July, 1828, the following order was entered: "Upon opening the matter to the court this day by Nathaniel Saxton, solicitor and of counsel with the complainant, it appearing that process of subpœna to appear and answer had been duly issued and served on the defendant in this case, by the sheriff of the county of Hunterdon; and it being alleged that a copy of the amended bill in this case had been duly served on Richard Stockton, Esq., the late solicitor of the said defendant; and that since the decease of the said Richard Stockton, Esq., and previous to the last term of this court, the said defendant had been duly warned to appoint another solicitor; and it appearing that the said defendant hath neglected to file any plea, answer or demurrer to the said bill, it is thereupon ordered and directed by the Chancellor that the complainant do produce documents, depositions and other evidence to substantiate and prove the allegations in his bill, to the end that such decree may be made against the said defendant as the Chancellor shall think equitable and just."

On the 7th October, 1829, Peter Williamson, examined on the part of the complainant, says—He is a son of Samuel Williamson, deceased, and is now in his 67th year; he recollects William Williamson, who was his uncle, and the son of William Williamson the elder; he recollects that his father, as the executor of William Williamson the elder, deceased, made sale of a farm as the property of said deceased; the said sale took place upwards of forty years ago; Cornelius Williamson, a brother of the deponent, was the purchaser of the said farm; the deed was not made and executed for the premises until some time after the sale was made; witness lived at home with his father when the sale was made, and thinks he did also when the deed was made, or prepared, to Cornelius Williamson, which was some time after the sale; witness went to a conveyancer, on the part of his father, to get the deed drawn for the premises, to Cornelius Williamson; my uncle, William Williamson, lived at that time in Virginia; he was twice in the county of Hunterdon, at my father's; once before and once after the sale was made to Cornelius Williamson; when he was

---

Williamson v. Adm'rs of Johnson.

---

there before the sale, witness understood that his uncle wanted money from witness' father as executor of William Williamson, deceased, and he further understood that his father paid him some and took his note for it, but does not recollect being present at the payment of the money or the giving of the note; the second time uncle William came to Jersey, which was after the sale, he remained here a considerable time, and came for his share of the money arising from the sale of the farm; witness knows the fact, because he was present at the transactions between his father and uncle on this business; witness knows that his father, as executor as aforesaid, paid his uncle William what he supposed to be in full of his share, and his uncle gave a final receipt in full; witness saw the money paid; I drew the receipt and acquittance myself; the money was paid and the discharge given at the house of John Hull, who was the husband of my aunt Margaret, who was a daughter and one of the legatees of the said William Williamson the elder, deceased; the receipt or acquittance was signed by uncle William, sealed, and was witnessed by deponent and one Uriah Bonum; witness cannot recollect the precise amount of money that was paid, but understood that the note which his uncle William had before given to his father, was deducted from the amount of his share, and the balance paid to him in money.

At the time uncle William was paid his share, witness lived on the premises before mentioned; on the morning of the same day that uncle was paid, my father, as executor as aforesaid, at my house on the premises, paid my aunt Micha, another of the legatees, her specific legacy, and took her receipt; witness drew the receipt for aunt Micha, and saw it executed, and was also a witness to it; thinks that Uriah Bonum was a witness to it also; he was there.

From my house, on the same day, deponent, his father and uncle William and Uriah Bonum went to the house of John Hull, and there my father, as executor as aforesaid, paid the said John Hull and his wife their specific legacy, and took their receipt and acquittance under seal; witness drew the acquittance from John Hull and wife himself, and saw it executed, and signed his name, together with Uriah Bonum, as witness

---

Williamson v. Adm'rs of Johnson.

---

to it. The paper now shown to witness, and marked Exhibit B on the part of the complainant, (*pro ut* the same,) witness says is the original receipt or acquittance executed by Hull and his wife, and witnessed by Bonum and deponent at that time; witness is satisfied that this receipt or acquittance was executed at the very day it bears date, and recollects making a correction in the last line but one of it, in the date, from the first to the second day of April, on the suggestion of his father that he had made a mistake in the day of the month.

At the same time and place, my father, as executor as aforesaid, paid my uncle William his share, and my uncle William executed a receipt or acquittance, under his hand and seal, which was witnessed by deponent and Uriah Bonum; cannot say which was paid first, uncle William or Hull and his wife; the receipt from my uncle William to my father as executor, was drawn by me, and was in the same form as the one from Hull and his wife, except that it was for a share instead of a specific legacy, and of the same date and executed the same day; Uriah Bonum, the other subscribing witness to those receipts, has been dead some years; witness recollects having seen the receipt or acquittance from his uncle William to his father in the possession of his father since that time.

Deponent has seen a man called Abraham Williamson, from the western country, who has been in New Jersey since the commencement of the cause; the said Abraham Williamson has been at different times at the house of this deponent, while he was in this state, and represented himself as the son of the said William Williamson, deponent's uncle; witness thinks the said Abraham is the son of his uncle William, from family resemblance, and also from the said Abraham reminding him of some circumstances that took place at the house of his uncle William a good many years ago, when deponent was there, and when the said Abraham was a little boy, and which the deponent recollected when reminded of them; in conversation with the said Abraham respecting the payment made by deponent's father, as executor as aforesaid, to uncle William, the said Abraham's father, and its having been recovered again from Benjamin Johnson, his father's security, by Asher Williamson, and Benjamin Johnson's claiming it back in this suit,



---

Williamson v. Adm'rs of Johnson.

---

the said Abraham Williamson said that Asher Williamson was willing to pay it back to the children of Samuel Williamson, deponent's father, and that deponent was a fool if he did not go and get it, but that Asher did not want to pay it to Benjamin Johnson; deponent's brother, William Williamson, lives now and has lived for several years, in the State of Kentucky.

At the time of the payment made by my father, as executor as aforesaid, to uncle William, deponent knew the amount of the payment when it was made, but cannot now recollect the amount; but witness is satisfied that the payment made to uncle William was the full amount of his share of the proceeds arising from the first sale of the said farm; deponent never drew or witnessed but one receipt or acquittance, which he has before mentioned, from his uncle William to his father as executor as aforesaid, for the share of his said uncle William; all the transactions of which deponent has spoken, between his father as executor as aforesaid, and his uncle William, took place long before the death of deponent's uncle Cornelius Williamson, and before the bill filed in chancery by the heirs of the said Cornelius against my father, for the purpose of setting aside the first sale of the said farm.

The papers and vouchers referred to in the foregoing deposition of Peter Williamson, were produced at the time of his examination, and made exhibits on the part of the complainant.

May 7th, 1832. Peter Williamson, being again examined, deposed as follows: He recollects having a conversation with Asher Williamson, at Pennington, in the county of Hunterdon, some years ago, on the subject of a payment made by Samuel Williamson, deponent's father, as executor of William Williamson, deceased, to William Williamson, one of the sons and legatees of the said deceased, for his share of the moneys arising from the first sale of the real estate of the said William Williamson, deceased, and also on the subject of a receipt given by the said William Williamson to the said Samuel Williamson as executor for the said share; that conversation took place at Pennington, in Hunterdon county, many years ago; the particular year deponent does not recollect, but it was during the pendency of a suit in the Court of Chancery of this state

---

Williamson v. Adm'rs of Johnson.

---

between Asher Williamson and others, complainants, and Samuel Williamson, executor as aforesaid, defendant; they were taking some examinations in that suit, at the time of this conversation, before James Linn, esquire, a master in chancery; in that conversation, I told Asher Williamson that such a payment had been made, and a receipt given, to which deponent and Uriah Bonum were witnesses, and that if the receipt was ever found it would so appear; deponent's father was not present at this time; deponent attended the examination on behalf of his father.

Some years after this time, and during the lifetime of deponent's father, the particular day and year the deponent cannot now designate, the deponent met Asher Williamson at the tavern of Joseph Kughler, in Amwell, Hunterdon county, for the purpose of making a settlement of the account of Samuel Williamson, as executor of William Williamson, deceased; on that occasion, the receipt of which deponent has last spoken, and which is mentioned in his former deposition, was produced; deponent thinks it was produced by William Maxwell, esquire; deponent saw it, and had it in his hands and examined it; deponent believes Asher Williamson saw it also; he was there, and deponent conversed with him respecting the receipt, and recollects telling Asher that he, deponent, hoped there would now be no more dispute respecting the receipt; deponent's father was unwell and was not present that day; deponent attended on the part of his father.

Afterwards, and after the death of deponent's father, and also after the farm of Benjamin Johnson had been sold at the suit of William Pennington, late Governor of the State of New Jersey, to Cornelius Williamson, deponent recollects Benjamin Johnson's coming to his house and inquiring of him respecting a payment made by Samuel Williamson, as executor of William Williamson, deceased, to the said William Williamson the younger, for his legacy or share of the moneys arising from the first sale of the real estate of the said testator, made by the said Samuel Williamson, and the receipt or acquittance therefor; deponent then informed said Johnson that there had been such a payment made, and that there had positively been such a receipt given, and if it was ever found, it would so appear; de-

---

Williamson v. Adm'rs of Johnson.

---

ponent had at that time a number of papers of his father's in his possession, and he and Johnson searched them all over, but could find no receipt.

January 11th, 1831, Charles Bartles, esquire, sworn on the part of the complainant, saith that he is acquainted with the parties in the above cause; has been in the office of Mr. Saxton since the year 1822; recollects that after the first sale of the property of complainant by virtue of an execution, at the suit of William S. Pennington, governor, &c., against the complainant, as survivor of Samuel Williamson, deceased, complainant came to Mr. Saxton's office; he complained that there was a mistake in the amount of the judgment for which that execution had been issued; that the judgment had been taken for more money than was really due upon the bond to the governor, and wished Mr. Saxton to try and set aside the sale; the complainant at the time stated that some moneys had been paid by Samuel Williamson, as an executor of William Williamson, senior, deceased, that ought to have been deducted from the amount recovered by that judgment.

Deponent recollects that there was a difficulty about ascertaining the amount that Samuel Williamson had paid to said William; he complained having no receipt to show it; that Mr. Saxton directed him (complainant) to go to several places, and amongst them to one Terhune's, to see if he could not find such a receipt, and also to examine for it among the papers of George C. Maxwell, deceased; Mr. Saxton observed at the time that said Maxwell had done Samuel Williamson's business, and that the receipt might be among his papers; deponent recollects hearing that a considerable deal of search was made for such receipt, and that after some length of time it was said to have been found; after it was found Mr. Saxton filed the bill in this cause; deponent recollects distinctly to have seen the receipt in Mr. Saxton's possession, among the papers in the cause, frequently, from the time it was found until it was lost again, which was about the year 1827; some time after the filing of said bill, a person calling himself Abraham Williamson, and representing himself to be the son and administrator of William Williamson the younger, deceased, and to be a citizen of the State of Kentucky, came to New Jersey, and



---

Williamson v. Adm'rs of Johnson.

---

claimed the amount of the moneys recovered of Benjamin Johnson by the said Asher Williamson, and then in his, Asher's, hands; in conversation with said Abraham Williamson, I told him, at several different times, that he, complainant, had filed a bill in chancery for the recovery of a part of the money collected by him, Asher, on the above-stated execution against complainant; and that complainant said that that judgment had been taken for the whole amount of William Williamson, junior's, share of William Williamson, senior's, estate, and that Samuel Williamson, the executor of William Williamson, senior, had paid, in his lifetime, to William Williamson, junior, the amount of his share of the moneys arising from the first sale of William Williamson, senior's, estate; and that he, William Williamson, junior, had given Samuel Williamson a receipt for it, which had not been allowed in making up that judgment; deponent, at Abraham Williamson's request, produced the receipt and showed it to him; he admitted the signature to it to be the handwriting of his father, and several times said he would go to Asher and get him to allow the amount of said receipt, and pay it back to complainant; at one time deponent recollects he (Abraham Williamson) came to him and got him to make out a statement of the amount of said receipt, and said he would go to complainant and pay him back; this was in 1827; he said then that the whole of the moneys collected by Asher Williamson upon said execution against complainant would be coming to him; some time shortly after this, he, Abraham Williamson, came to deponent again, saying he had lost the statement above mentioned, and wanted deponent to make him another; deponent got the papers in the cause, took out the receipt, and made another statement for him; this was done in Mr. Saxton's office, he, Abraham Williamson, sitting by all the time; a short time after this, I understood that the parties were to have a meeting at Mr. Saxton's office, to try and settle the matter, upon a certain day fixed by them; they met accordingly; Mr. Saxton being absent, they wished me to get the receipt and ascertain the amount due on it; I got the papers, and, upon examining them, the receipt was gone; I told them I could not find it; he, Abraham Williamson, then said he was willing to pay the amount of the

---

Williamson v. Adm'rs of Johnson.

---

receipt to Johnson, complainant, but that the receipt must first be produced; deponent then mentioned to him that he, Abraham Williamson, had a statement of the amount of the receipt, and that he could as well settle the matter by that as by the receipt itself; his only reply was, "produce the receipt;" he said he would not settle unless the receipt was produced; in speaking of a settlement with complainant, at different times since, I have heard him say, let them produce the receipt, and he would pay it; at other times, "they can't produce the receipt;" from the whole conduct of said Abraham Williamson, at the time they met at Mr. Saxton's office to settle, and afterwards, he, deponent, has been induced to believe, and does believe, that he, Abraham Williamson, had stolen the receipt at the time deponent made the last statement of the amount of it for him; deponent has made search for the receipt since, and has not been able to find it; thinks the receipt was given for about £130; deponent says the application of the said Abraham Williamson for statements of the amount of said receipt were made by him in the absence of Mr. Saxton from his office.

January 11th, 1831, William H. Johnson, sworn on the part of the complainant, saith he is the son of complainant; he recollects that, at the time of the first sale of his father's property, by virtue of the execution in favor of William S. Pennington, governor, &c., his father was much surprised at the amount stated to be due upon the execution; he thought it was too high, and that, after the second sale, he (father) went to one Abraham R. Sutphen to get him to come with him to Saxton's to try and recover back a part of the money that had been collected at that sale; recollects that his father went to different places, at different times after this, to look for a receipt given by William Williamson, junior, to Samuel Williamson, executor of William Williamson, senior, and that he, deponent, went at request of his father to different places and persons to look for it, and could not find it; that finally deponent, Abraham Gullick, complainant, and Abraham R. Sutphen, came to Mr. Saxton's office; Mr. Saxton proposed to them that they had better go to William Maxwell, esquire, and search among the papers of G. C. Maxwell, esquire, for it; deponent and father went together to Mr. Maxwell's; he, William Maxwell, looked for

---

Williamson v. Adm'rs of Johnson.

---

the paper, but could not find it; he said he thought probably that it might be at Mr. Clark's office, among papers in his charge; Mr. A. Wurts and deponent then went to Mr. Clark's office, who was absent, and had left his key with Mr. Wurts, and, after searching awhile, we found a bundle of papers relating to William Williamson's estate; we brought the bundle to Mr. Saxton's office, and, upon examination, found in it the receipt in question—the same we had been looking for; the amount of it, deponent does not recollect, exactly, but he is sure it was for more than £100; deponent's father and Mr. A. R. Sutphen then requested Mr. Saxton to file a bill in chancery to recover back the amount of that receipt.

January 13th, 1831, Abraham R. Sutphen, sworn on the part of the complainant, saith he is acquainted with the parties in the cause; recollects hearing, at the time of it, of the first sale of complainant's property, at the suit of William S. Pennington, governor, upon execution; conversed with complainant, about the time; recollects that he complained of the large amount of the judgment; that he said it was security money, but deponent does not remember the conversation distinctly; complainant, however, has frequently expressed to deponent that he was disappointed by that judgment; that it was for a much larger sum than he had expected, and that there was some mistake in making it up; that a certain payment should have been credited, in making it up, that had not been credited, but what payment, or for what sum, deponent does not now recollect; deponent recollects going, at complainant's request, in company with Abraham Gulick, to one Abraham Terhune's, in the county of Somerset, where Samuel Williamson died, to examine his papers, and see if there was not a receipt or some paper among them, that would show the amount of moneys paid out by him as executor of William Williamson, senior, deceased; Mr. Terhune's family showed us all the papers (as they said) of Samuel Williamson; we examined them, but found nothing relating to the matter we were inquiring into; we returned and informed complainant; he appeared to be surprised at the information, and seemed to think that they had destroyed the paper; complainant was still very anxious to search for and find the paper, and appeared to be very certain



---

Williamson v. Adm'rs of Johnson.

---

that there had been such a paper, and that it must be in existence yet, unless it had been destroyed; some time after, this deponent was in the office of Peter I. Clark, esquire, and, seeing Mr. William Maxwell there drop some papers upon the floor, in pulling out a pocket-book from his pocket, he, deponent, picked up some of them, and saw upon them the name of Samuel Williamson, deceased; he informed complainant of that circumstance, and told him that he rather thought the paper in question, if in existence yet, must be in his, Maxwell's, office; the bundle of papers that Mr. Maxwell dropped from his pocket, was taken up by persons present, and left in the possession of Peter I. Clark, esquire; after this, deponent, complainant and his son, William H. Johnson, and Abraham Gulick came to Flemington in company, to see Mr. Saxton, and make further search for the paper in question; Mr. Saxton advised us to make further search for the paper, and, upon deponent's mentioning, again, the circumstance of his seeing the papers dropped by Mr. Maxwell, it was concluded to go there, and to Mr. Clark's office; Mr. Saxton suggested that Mr. Clark was gone from home, and that they had better apply to Mr. Wurts, with whom Mr. Clark had left the key of his office; William H. Johnson and Abraham Gulick went accordingly, and, after some time, returned with a bundle of papers relating to Samuel Williamson's business, to Mr. Saxton's office; the bundle was examined by Mr. Saxton, and the paper in question found in it, and read in deponent's presence, purporting to be a receipt from William Williamson to Samuel Williamson, executor of William Williamson, deceased, for moneys paid by him; the amount, about £130; don't recollect, exactly; deponent recollects that, thereupon, Mr. Saxton advised the filing of the bill in chancery, by deponent and complainant, in order to recover back the amount of that receipt; deponent recollects conversing with Asher Williamson about the matter, after the bill was filed by Mr. Saxton; he, Asher, told deponent, at the time, that he was satisfied, and really believed that the amount of that receipt ought to be repaid to complainant, but that he could not do it; he, Asher, at the time, made an estimate of the amount of it, and, deponent thinks, made it over \$1000—he thinks about \$1100; he, Asher, said he was willing to pay complainant the

---

Williamson v. Adm'rs of Johnson.

---

amount of the receipt, but he did not want the lot to be sold which he had bought at the sale of Samuel Williamson's property.

On the 19th day of January, 1832, it being alleged that the complainant had departed this life since the commencement of this suit, intestate, and that administration, &c., had been granted to John T. Neely and William H. Johnson, upon whom the interest of the said decedent in the matters in question in this case hath devolved, it was thereupon ordered by Chancellor Vroom that this suit be revived at the suit of the administrators as complainants against the said defendant.

May 12th, 1832, Nathaniel Saxton, sworn on the part of the plaintiff, being shown the paper marked Exhibit A, in this case, deposeth and saith that he was present and saw Peter Williamson, the releasor, sign and deliver the same, and this deponent subscribed his name as a witness thereto; that it was executed on the day it bears date, and previous to the examination of the said Peter Williamson as a witness in this case; the deponent further saith that about the month of September, 1822, shortly after the first sale of Benjamin Johnson's property, on the execution at the suit of William S. Pennington, late governor, &c., against Benjamin Johnson, survivor of Samuel Williamson, deceased, the said Benjamin Johnson applied to the deponent to know if he could not be relieved against that sale, which he alleged had been made at a great sacrifice; he, at the same time, expressed great surprise at the amount demanded on the execution being so large—upwards of \$2200; he stated that the judgment and execution were for moneys claimed by Asher Williamson, as administrator of William Williamson, deceased, for said William Williamson's share of the moneys arising from the sale made by Samuel Williamson, executor of William Williamson the elder, of a farm of the testator's, under the direction of the Court of Chancery, and for which he (Johnson) had become security for the said Samuel Williamson; but he did not know the amount that was due; that he had understood that Samuel Williamson had made a payment to William Williamson, in his lifetime, on the amount, but that before this action was brought Samuel Williamson had removed to the county of Somerset and died there, and left no executor, and no person had administered, as he knew of; and he knew not where to

---

Williamson v. Adm'rs of Johnson.

---

find any papers or vouchers to prove the payment or show the amount really due; that he had also heard that about the time of the commencement of the suit against him, Asher Williamson had said that there was only about \$1100 or \$1200 due from Samuel Williamson, as executor of William Williamson, deceased, to him, Asher, as administrator of William Williamson the younger, deceased, on his share of the estate; from which he expected that Asher knew the amount actually due, and intended to claim no more; and in consequence of these circumstances he did not appear to make any defence in the action; that deponent inquired into the circumstances of the sheriff's sale of Johnson's property, which, in consequence of an irregularity in advertising, was abandoned, and a second sale made in May, 1823, which satisfied the judgment; Johnson then wished deponent to take some measures to recover back from Samuel Williamson's estate, if any could be found, the moneys he had been compelled to pay as his security, or to relieve him against this judgment, and recover back from Asher Williamson the amount paid over and above what was actually due; deponent advised him to take out letters of administration of the estate of Samuel Williamson, and also to go to one Terhune, in Somerset county, where it was said Samuel Williamson had died, and search for some receipt or voucher to show the payment made by Samuel Williamson to William Williamson; that about 10th June, 1823, Benjamin Johnson, Abraham R. Sutphen, Abraham Gulick and William H. Johnson came to deponent's office to consult further on the subject, and informed him that they had searched for, but had not been able to find any receipt from William Williamson; deponent then advised them to go to William Maxwell's, and search among the papers of George C. Maxwell, Esq., who had done business for Samuel Williamson, in his lifetime; one of the company went to Mr. Maxwell's, but returned without finding anything; it was then proposed by some one, deponent don't recollect who, to search at the office of Peter I. Clark, Esq., and one of the company, deponent thinks it was William H. Johnson, went, and after a short time returned with a bundle of papers of Samuel Williamson's, relating to the estate of William Williamson, deceased; upon opening this bundle and examining the papers



we found among them the receipt or acquittance under seal, from William Williamson to Samuel Williamson, executor of William Williamson, deceased, bearing date the 2d day of April, 1792, for £131 10s., in full for his share of the legacy under the will of the said William Williamson, deceased; this receipt was signed "William Williamson," and attested by two subscribing witnesses, one of whom deponent recollects was Peter Williamson, with whose handwriting deponent was acquainted, and whose signature he recognized; the body of the receipt appeared to be in the same handwriting as the receipt of John Hull and Margaret, his wife, marked Exhibit B in this case; it bore the same date, and deponent thinks was attested by the same witnesses; upon finding this receipt, deponent advised the filing of a bill in chancery, which, after procuring other documents and information, he prepared; at the time of preparing the bill he had this receipt of William Williamson before him, and intended to describe it, and believes he did describe it truly in the bill; this bill was filed on or about the 6th March, 1824, in the names of Abraham R. Sutphen, administrator of Samuel Williamson, deceased, and Benjamin Johnson, complainants, against Asher Williamson and others, defendants, to which a plea and demurrer was filed by Mr. Richard Stockton, solicitor for Asher Williamson; after argument of the demurrer, deponent had several conversations with Asher Williamson on the subject of the suit; in those conversations Asher objected, strenuously, against that part of the bill which sought a review of the former decree, and to set aside the sale of a lot of land sold as the property of Samuel Williamson, and bought by him, but made no objection to the relief sought against the judgment obtained by him against Benjamin Johnson; as to that, he said he knew that the receipt (alluding to the said receipt of William Williamson to Samuel Williamson, executor, &c.,) was right; that Johnson ought to have the money back; that if the bill had been filed for that only, he would have made no objection to it; that he was willing to pay that money back to Johnson if he would be justified in doing so; that deponent informed Asher that he would amend the bill so as to confine the object of it to the recovering back of the money overpaid by Johnson, and did amend the bill in the shape in which it

---

Williamson v. Adm'rs of Johnson.

---

now appears ; that deponent informed Asher that he had amended the bill in that way, and suggested that Mr. Stockton, his solicitor, could put in an answer admitting the facts as they really were, and upon that the cause could be heard and a proper decree made ; that Asher assured this deponent that he would write to Mr. Stockton and authorize him to proceed in such a way that Johnson might get back the money overpaid, if it could be done, so that he, Asher, would be justified in paying it ; that it was right that Johnson should have it, and he would as lieve pay it to him as anybody if he was safe in so doing ; that deponent mentioned these conversations to Mr. Stockton, but a long time elapsed without Asher's calling upon him ; that Mr. Stockton at length wrote to Asher, and this deponent delivered the letter, on the receipt of which Asher promised that he would go and see Mr. Stockton on the subject, but deponent never heard that he did ; after Mr. Stockton's death, about 25th March, 1828, deponent gave Asher notice to appoint another solicitor, but no answer having been put in, on or about the 12th July, 1828, an order to produce proofs was obtained, after which Asher still proposed putting in such an answer that Johnson might get his money ; deponent further saith that, some time after the commencement of the suit, a person calling himself Abraham Williamson, who claimed to be the son and administrator of the said William Williamson the younger, came to this country and called on deponent for information respecting the estate of William Williamson, deceased ; deponent informed him what he knew about it, and that there was money in Asher Williamson's hands belonging to the estate of William Williamson, deceased, which he had recovered of Benjamin Johnson, but that there was a mistake—that Asher had recovered more than was due, and the present suit was depending to recover it back ; he asked deponent to let him see the receipt of William Williamson, his father, as he said ; deponent showed it to him, and read it to him ; he said it was right, whatever his father had received ought to be paid back if it had not been allowed ; he called on deponent frequently, and conversed on the subject, and finally proposed that he would settle with Johnson, and pay him back the money himself, and then proceed against Asher for the whole amount he had received ; he pro-

---

Williamson v. Adm'rs of Johnson.

---

posed compromising it, and paying something less than the full amount due Johnson, and wished deponent to settle it with him, which deponent declined doing, and proposed that he and Johnson should meet at deponent's office and settle it, which he agreed to, and a day was appointed; and he requested deponent to make a calculation, which deponent promised to do, but did not make the calculation or show him the receipt at that time; after he was gone deponent made a calculation; he believes the paper Exhibit F to be the calculation he made; at the time of making the calculation, he had the receipt of William Williamson the younger before him, and believes the date and amount of the receipt to be truly stated in that calculation; after making it, he put up the receipt among other receipts in a bundle of papers in the case, and put them in his paper case, and gave Johnson notice of the time of meeting; deponent went from home, he thinks, to attend court at Trenton, and did not return on the day of the proposed meeting until in the afternoon; he found Benjamin Johnson and Abraham R. Sutphen at his office, and was informed that Abraham Williamson had been there, but that Mr. Bartles could not find the receipt, and Williamson had refused to do anything; deponent then searched, but it was not in the bundle, and he has never been able to find it since; deponent is entirely ignorant of what has become of it, but is satisfied that it must have been surreptitiously taken out of his office in his absence; that it is lost and cannot now be found.

On the 8th of April, 1833, on a statement of the facts as is set forth and alleged in an order of this court made by Chancellor Vroom on the 19th January, 1832, it was, on the 8th of April, 1833, ordered and directed by Chancellor Seely, that the said order of the 19th January be confirmed as fully as if the same was made at this date, and that this suit be and do stand revived and continued by and in the names of the said John T. Neely and William H. Johnson, administrators, &c., of the said Benjamin Johnson, as complainants, against the said defendant, pursuant to the statute in such case made and provided.

On the 20th July, 1833, an interlocutory decree was made by Chancellor Seely, referring it to a master to take an account, &c.



---

Williamson v. Adm'rs of Johnson.

---

On the 15th July, 1834, the defendant filed his affidavit as follows :

Asher Williamson, the defendant in this cause, being duly sworn, saith that on the 6th March, 1824, Abraham R. Sutphen, administrator of Samuel Williamson, and Benjamin Johnson, exhibited their bill of review against this deponent, and William Williamson and Cornelius Williamson, defendants, (stating the proceedings on the bill of review ; ) that afterwards, to wit, on the 15th day of October, 1827, the Chancellor ordered that the complainants have leave to amend the bill of complaint in this cause by striking out the names of Abraham R. Sutphen as complainant, and William Williamson and Cornelius Williamson as defendants, and also so much and such parts of the said bill as seek a review of the decree between William Williamson and others, complainants, and Samuel Williamson, defendant, in the said bill mentioned and set forth, and all other irrelevant matter in the said bill contained, so as to confine the object of the said bill to the relief of Benjamin Johnson against a judgment in the bill mentioned to have been obtained against him in the Supreme Court by this deponent, upon the said complainants' paying the defendants' solicitor the costs of the plea, demurrer and argument, and amending the copy of the defendants' bill gratis ; that in the said suit on the said bill of review, this deponent and the said William Williamson and Cornelius Williamson had employed Richard Stockton, esquire, their solicitor and counsel ; that Richard Stockton died sometime in the month of March, 1828, as this deponent hath been informed ; that this deponent hath no recollection of ever seeing his solicitor after the opinion of the court was delivered ; that when the opinion was delivered, sustaining the plea and demurrer, Mr. Stockton told him to go home and rest easy, that he would not be further troubled with that suit, and that it was at an end and that he was clear of it ; that he never knew of any order to amend until on inspecting the files of this court this day he discovered it ; that no amended copy of the complainants' bill has ever been served on him ; that no subpoena in the above suit has ever been served on him ; that some time after the death of Mr. Stockton, a notice was served on him, warning him to appoint a solicitor in his place ; but as the ori-

---

Williamson v. Adm'rs of Johnson.

---

ginal suit was at an end, as he conceived, and he had never any knowledge of any new suit by striking out the names of one plaintiff and two defendants, and a considerable portion of the original bill, he was ignorant whether he could be considered his solicitor in the new suit ; nevertheless he applied to Garret D. Wall and Alexander Wurts to do what was necessary for him ; that since that time he has supposed the suit at an end, never having heard any more of it, more especially as Benjamin Johnson, the complainant, hath since died ; that no order reviving the suit has ever been served on him ; that about three weeks ago he was informed by Mr. Wurts that a decree had passed against him in this case, and that it was referred to a master to take an account ; that he immediately called on him, brought to his recollection the fact of his having given him a fee in the case, and that he believes that from some misconception between him and Mr. Wall in respect to who was to act as the solicitor, neither of them entered an appearance for him in this suit ; that on examining the proceedings in this cause it appears that the decree was signed on the 12th July, 1828, but not filed until the 29th January, 1829 ; that the complainant produced documents, &c., in which it is alleged that a subpoena in this case was served on this deponent, which is not true ; it is also alleged that a copy of the amended bill in this case has been served on Mr. Stockton, but it is not alleged that the costs were either tendered or paid to him ; that in the term of January, 1832, it appears that the suit was ordered to be revived in the names of William H. Johnson and John T. Neely, administrators of Benjamin Johnson, and that on the 8th April, 1833, the said order was confirmed ; and this deponent further saith that neither of the said orders was served on him ; that in the term of July, 1833, a decree was made against this defendant, in his absence and without notice ; that he hath never had notice of taking any depositions, and that he believed that the said suit was ended ; and this deponent is advised that the said proceedings are irregular ; and this deponent further saith that he is advised by his counsel that he hath a good defence to make in this case ; that he is an administrator acting as trustee for others, and ought to make defence ; that he is wholly ignorant of the receipt stated in said bill, of his

---

Williamson v. Adm'rs of Johnson.

---

personal knowledge, and that he is ignorant of the handwriting of William Williamson, his intestate, and never saw said receipt or acknowledged or admitted it to be genuine or correct, and has no reason to believe that it is; that he never heard that any such receipt was pretended to have been given or any payment to have been made, (except as the same may be stated in the answer of Samuel Williamson, which he did not credit,) until after he had obtained judgment, in the name of William S. Pennington, against the said Benjamin Johnson, and after the money was raised by execution; that he never believed or admitted that the said money was paid, or receipt given, or in existence or lost, as stated in the said bill, and that according to the best of his knowledge and belief, the said money mentioned in the said receipt was never paid to the said William Williamson, his intestate; that he cannot on inquiry ascertain that he was in this state at or about the time it is stated to have been given; that he verily believes that it is his duty as a trustee to make defence in this suit, and it was always his intention to do so, and has been prevented by his error in thinking that the suit was at an end when the plea and demurrer filed by Mr. Stockton was sustained, and by his confidence that if anything was necessary to be done afterwards it would be done by Mr. Wall or Mr. Wurts, who were employed by him after he was warned to appoint a solicitor in the place of Mr. Stockton; and that he is about to apply to set aside said decrees for irregularity, and if he fails in that, to be allowed an opportunity for defence; that the said application is not made for delay, but *bona fide*, to enable him to discharge his duty, and to have a decree founded upon the justice and merits of the case.

On the 18th July, 1834, it was ordered, on reading the said affidavit, that complainants show cause on the first day of the next term why the interlocutory decree made in the term of July last should not be set aside for irregularity, and if it should be held to be regular, then that the said complainants show cause, at the said time, why the said decree should not be opened and the defendant be permitted to file an answer, upon such terms as shall seem to the court equitable and just; and in the meantime that the complainants do abstain from any proceed-



---

Williamson v. Adm'rs of Johnson.

---

ings under the said interlocutory decree, or from taking any account under the same.

On the 18th July, 1838, it was ordered that the defendant bring on the hearing of his rule to show cause at the next term, or that it be discharged.

On the 22d January, 1839, on reading an affidavit of Nathaniel Saxton, taken 21st January, 1839, an order was made discharging the rule to show cause, if cause be not shown during that term, and substituting James N. Reading as master.

On the 27th August, 1839, James N. Reading, esquire, one of the masters, made a report, whereby he found to be due complainants from defendant, \$1988.50½.

On the 16th October, 1839, the report was confirmed, and final decree by Chancellor William Pennington, and execution issued, returnable to April Term, 1840, for the sum reported to be due, with interest from 27th August, 1839, and costs, \$175, and interest.

On the 16th July, 1840, it was ordered that all further proceedings on the execution be stayed until the further order of this court; and that, in the meantime, the execution and levy do stand as a security for the complainants until the further order of this court.

On the 15th July, 1841, it was ordered that the decree and proceedings thereupon had in this case do stand as a security for any amount that the complainants may be entitled to recover in this case; that the defendant have leave to file an answer within forty days from the date of this order, and to examine witnesses, and to cross-examine any already examined, so that such examination be closed on or before the 20th day of September next, so that the cause may be heard at the next term of this court; and that the complainants have leave to read the depositions heretofore taken; and that the defendant serve a copy of his answer gratis on the solicitor of complainants as soon as filed, upon condition that defendant pay the costs taxed since the decree of July 20th, 1833, and including said decree.

On the 18th July, 1841, defendant filed his answer. He denies that, to his knowledge or belief, the said Samuel Williamson, on the 2d day of April, 1792, or at any other time, paid to William Williamson the younger, the sum of £131 10s., or

---

Williamson v. Adm'rs of Johnson.

---

any other sum, for his share of the proceeds of the first sale ; or that the said William made, executed, and delivered to the said Samuel Williamson, an acquittance or discharge in full of his said share, bearing date on that or any other day.

He says that he has heard, and believes it to be true, that the said Samuel Williamson, when he procured the said Benjamin Johnson to become his surety, received the said sum of \$4734.22 in cash, and that he deposited in the hands of the said Benjamin Johnson, in order to secure him from any loss, the sum of \$2000, or some other large sum of money, which sum remained in his hands at the time of the commencement of the action in the name of the said William S. Pennington ; and this defendant further saith, that the complainant, Benjamin Johnson, as soon as he found that this defendant had commenced, or was about to commence an action against him, in the name of William S. Pennington, Chancellor as aforesaid, by a deed purporting to bear date on the 5th day of June, 1821, and to be made between the said Benjamin Johnson and his wife, of the first part, and William H. Johnson and Clarissa Johnson, the son and daughter of the said Benjamin Johnson, of the second part, for the pretended consideration of \$10,000, did convey to the said William H. Johnson and Clarissa Johnson the three several tracts in the said bill mentioned, with full covenants ; which said deed was acknowledged on the 29th day of September, 1821, and recorded on the 1st day of October in the same year. And the defendant charges that the said deed was made without a valuable consideration, and was contrived of covin and fraud, to defeat the recovery of any money on the said bond on which the said Benjamin Johnson was surety. That the said William H. Johnson and Clarissa Johnson made formal proclamation of their pretended title, and a parade of warning all persons from purchasing ; and it was not until after this defendant had purchased the said property, (at the first sheriff's sale thereof, which was abandoned for irregularity,) and thereby evinced his determination to rely upon his legal rights, that the said Benjamin Johnson, William H. Johnson, and Clarissa Johnson saw fit to abandon the pretended deed so as aforesaid made ; and the said William H. Johnson and Clarissa Johnson became the purchasers of the same property at sheriff's sale, and after-

---

Williamson v. Adm'rs of Johnson.

---

wards hit upon the expedient of setting up the pretended receipt set forth in the bill of complaint.

He denies that he ever knew or believed that the said Samuel Williamson had ever paid to the said William Williamson the younger any part of his share, or that he ever was so told by any person, or ever admitted that the said Samuel Williamson had ever paid any part of the said share to the said William Williamson the younger; and he expressly denies that the payment of the said sum of money pretended in the bill of complaint to have been made by the said Samuel Williamson to the said William, and the existence of the said receipt therefor, was well known to this defendant, or that he had repeatedly, or at any time, admitted that a payment had been made, or that, after the commencement of the suit against the said Benjamin Johnson, and before the execution of the said writ of inquiry, or at any other time, he had admitted that there was only \$1000 or \$1200 due to the said William, which was all he expected to recover of the said Benjamin Johnson, or any other sum less than the whole amount of the share of the said William, ascertained in the before-mentioned suit in chancery, prosecuted by this defendant and his brothers and sisters, against the said Samuel Williamson. And he further denies that he ever saw any such receipt, or that any such receipt was ever shown to him by any person whatever.

He admits that, in the answer of the said Samuel Williamson to the bill filed by this defendant and his brothers and sisters, he, the said Samuel Williamson, alleged that he had paid and satisfied the said William Williamson and John Williamson, two of the sons and devisees of the said William Williamson, deceased, their shares; and, in the same answer, he also alleged that he had settled with the father of this defendant for his share; and, inasmuch as he altogether failed to prove that he had settled with the father of this defendant, as he had alleged in his answer, and offered no proof that he had paid and satisfied the said William Williamson, in support of the allegation in his answer, or showed, or pretended to have any receipt or discharge therefor, this defendant did not, at any time, believe the allegation, in that respect, contained in the answer of the said Samuel Williamson, the more especially as this defendant



---

Williamson v. Adm'rs of Johnson.

---

had never heard or believed that the said William Williamson ever came to New Jersey after the sale of the said farm of the said William Williamson, or that the said Samuel Williamson paid him, on the 2d day of April, 1792, £131 10s., in full of his share of the moneys arising from the first sale of the farm of the said testator, or any other sum of money, except what is stated in the answer of the said Samuel Williamson, which this defendant never believed to be true.

He denies that, after the decease of the said Samuel Williamson, or at any time before, he went to the house of the said Abraham Terhune, where he died, and examined his papers remaining there, or that he ever made any search anywhere, among the papers of the said Samuel Williamson, or any other person, for a receipt or acquittance from the said William Williamson to the said Samuel Williamson, or for any other paper belonging to the said Samuel Williamson, but, on the contrary, this deponent never believed that any such payment had been made by the said Samuel Williamson to the said William Williamson, nor does he now believe it, nor did he at any time believe, nor does he now believe, that any such receipt or acquittance was ever given by the said William Williamson to the said Samuel Williamson, as is pretended in the said bill of complaint, nor was any such receipt or acquittance ever shown to him, or offered to be shown to him, by any person, or seen by him, at any time; and he always believed, and still believes, that no proof, entitled to credence, could be produced of such payment, and that no such acquittance or discharge ever existed, or could or would be produced.

He admits that he did cause to be exhibited, before the said inquest, a claim for the whole amount of the share of the said William Williamson, deceased, of the moneys arising from the second sale and net proceeds of the said farm, upon the footing of the before-mentioned decree of October, 1813, with the interest thereon, without allowing any credit for any payment, and that the whole amount of the said claim was assessed and found for the plaintiff, by the said inquest, as is set forth in the said bill; but he denies that he knew, at any time, or suspected or believed, or does now, that such payment had been made and acquittance given, as is pretended in the said bill, or that the

---

Williamson v. Adm'rs of Johnson.

---

same ought to be credited; or that the sum so claimed and found was not due and owing by the said Samuel Williamson, as executor as aforesaid, to this defendant, as administrator of the said William Williamson, deceased; and he also denies that the complainant was deceived and surprised by the conduct of this defendant, or had the slightest reason to impute any such surprise or deceit to the conduct of this defendant, which was honest, frank and in strict conformity to the principles of law, justice and propriety, in enforcing an honest claim openly and by due course of law; and the attempt now made by the complainant to impute fraud and deceit to this defendant is as unfounded and unsupported, even upon the facts alleged, as it is untrue and unjust upon the true state of the facts; and this defendant humbly insists that the complainant has been guilty, even upon his own showing, of gross laches and inexcusable negligence; neglecting the proper means of making a defence in the proper and lawful manner, relying upon the success of his fraudulent attempt to put his property beyond the reach of his creditors, in the hands of his own children; and it was not until he found himself defeated in that effort, that he seems to have resorted to this expedient to accomplish the same end by other means; and this defendant insists that it is apparent from the statement of the complainant, that he voluntarily slept over the defence now set up until he was awakened by discovering that this defendant had purchased his property at the first sheriff's sale, notwithstanding his fraudulent conveyance to his children, and all his efforts to place his property beyond the reach of a judgment would fail.

And this defendant further saith that the complainant, before this defendant caused an action to be brought against him upon the bond so as aforesaid given to William S. Pennington, in the lifetime of the said Samuel Williamson, well knew of the claim of this defendant as administrator of the said William Williamson, and that he would be held liable for the same; and yet, by his own showing, being informed of the alleged payment by the said Samuel Williamson to William Williamson, he makes no defence, and takes no measures to obtain evidence until he found that his effort to place his property beyond the reach of a judgment had failed; and this defendant avers that

---

Williamson v. Adm'rs of Johnson.

---

at the time of the entering the judgment in the case of the said William S. Pennington, Chancellor, &c., against the said Benjamin Johnson, and the issuing of the execution thereupon, and the payment and receipt of the money thereon, as stated in the bill of complaint and this answer, this defendant did not know, other than as is hereinbefore stated to have been alleged in the answer of the said Samuel Williamson, to the bill of complaint of this defendant and others against him, as is set forth in the bill of complaint of the complainant; and he did not believe that the said Samuel Williamson had ever paid any part of the moneys due to the said William Williamson; nor does he know or believe, or had he heard, to his remembrance, that the said Samuel Williamson had, or pretended to have, any receipt or acquittance therefor; and this defendant verily believed that the allegation in the answer aforesaid, of the payment to William Williamson, was equally untrue and unsupported by evidence as the allegation of a similar payment to Cornelius Williamson, the father of this defendant, contained in the same answer; and he never took any measures, or did any act, or uttered any speech, which could mislead or deceive the complainant in relation to the said payment or receipt in any manner whatever, or prevent him from making any inquiries or defence he might see proper; or induce him to suppose that he claimed less than the whole amount of the proceeds of the sale and net rents of the said farm, upon the footing of the decree of October, 1813, coming to the share of the said William Williamson; and this defendant avers that the said judgment set forth in the bill of complaint, and referred to in this answer, is still in force, no ways reversed or set aside; that the matters in controversy, and the real, substantial parties were the same, and the whole merits of the case as stated in the complainant's bill might have been fully heard, tried and determined in the said action, and that the said judgment therein was obtained fairly and without fraud, covin or misrepresentation, or the taking of any undue advantage; and that no evidence has come to the knowledge of the complainant since the said commencement of the said action in which the said judgment was obtained, respecting any of the facts alleged in the said bill, which he might not have obtained and produced by the use of due and ordinary diligence in de-



---

Williamson v. Adm'rs of Johnson.

---

fence to the said action ; and this defendant insists upon the said judgment, and claims the same benefit thereof as if he had pleaded the same in this cause. And this defendant, for the reasons and under the circumstances aforesaid, is advised and insists that the said complainant is not entitled to any relief against this defendant touching the matters complained of in the said bill ; and also insists upon the said laches and negligence of the said complainant, and claims the full benefit thereof, as if the same had been pleaded also.

He denies that the complainant had not access to the papers of the said Samuel Williamson, or that he could not have found the papers of the said Samuel Williamson in relation to the said claim, or any documents or vouchers to enable him to contest or to make any defence against the same, or to create a personal representative of the said Samuel Williamson to investigate the state of his affairs, as well before as after the entering of the said judgment against the complainant, by the use of common and ordinary diligence and the appropriate inquiries and means for the purpose ; all the parties and witnesses residing in the neighborhood of the complainant, and it not being pretended that any papers were concealed or suppressed from him, or that any witnesses denied or withheld their knowledge when applied to in relation to any matter touching the same. And this defendant being entirely ignorant of the means used by the complainant to obtain information and papers respecting the pretended payment of Samuel to William Williamson, other than what is stated in his bill of complaint, neither admits nor denies what is stated by the complainant in his bill for that purpose, nor does he know anything in respect to the said pretended receipt from William Williamson to Samuel Williamson for £131 10s., bearing date the 2d day of April, 1792, nor has he ever seen any such receipt, nor does he believe that the said William Williamson ever received the said sum of money or any part thereof, or ever signed any such receipt or acquittance, or ever was in the State of New Jersey at the time it bears date, he, the said William, having left New Jersey before the revolutionary war ; and he has been informed and believes that the said William Williamson never could write his name or read writing. And this defendant knows nothing of the loss or mis-

---

Williamson v. Adm'rs of Johnson.

---

laying of the said pretended receipt, and, therefore, does not admit any such loss or mislaying, and hopes that the complainant may be compelled to make strict proof thereof, inasmuch as such pretences are easily made, and such would be the mode resorted to if a pretended receipt should be set up.

He denies that, to his knowledge or belief, he obtained the said judgment and execution against the complainant for a larger sum than was actually due, by any such fraud, deceit, concealment or surprise as is pretended in the said bill, or by any fraud, deceit, concealment or surprise whatever; or that the complainant had not the same means in his power to obtain the said receipt, if any such existed, and to prove the said payment and ascertain the amount thereof, as he has since discovered, by the use of the same diligence and means as he subsequently used. And he insists that all the allegations contained in the said bill, in respect to this defendant having heard of such payment being made, or seen the said acquittance and discharge, and well knowing of the same being given, or admitted that there was only a balance of ten or twelve hundred dollars, or declarations that he intended to claim no more, as is pretended in the said bill, is utterly and entirely false.

He says that after the filing of the present bill, and in March, 1828, Richard Stockton, his solicitor and counsel, died, having before his death told this defendant, when the decision was made by the Chancellor on the plea and demurrer, to go home, and that he would not be further troubled with this matter. That after the death of the said Richard Stockton, and without any previous notice to this defendant, to his recollection or belief, on the 29th day of January, 1829, and without the payment of any of the costs, which was the condition precedent for the leave to amend ordered by the court, an order was illegally and upon false allegations obtained for the complainant to make proof of the allegations, in the usual form. And this defendant avers that he was never served with any order, or warned to appoint a solicitor in the place of his deceased solicitor, Richard Stockton, to his recollection or belief, and he supposed that suit was ended. That on the 19th day of July, 1832, an order was made suggesting the death of Benjamin Johnson, the complainant, and reviving the suit in the name of his administrators, the

---

Williamson v. Adm'rs of Johnson.

---

present complainants. That this order was never served upon this defendant, and was wholly illegal, there being no statute authorizing such a revival, and the only mode of revival then lawful, being by bill of revivor,

That on the 7th day of October, 1829, the deposition of Peter Williamson was taken, without any notice to this defendant, and, on the 7th day of May, 1832, his deposition was again taken, without any notice to this defendant. That on the 11th day of January, 1831, the depositions of Charles Bartles and William H. Johnson were taken, and, on the 13th day of the same month, the deposition of Abraham R. Sutphen was taken, without notice to this defendant, and, on the 12th day of May, 1832, the deposition of Nathaniel Saxton was taken; and all the said depositions were filed on the 16th day of July, in the same year. That on the 12th of February, 1833, an act of the legislature was passed, authorizing a revivor by rule, in the case of the death of a sole complainant, upon the terms and in the manner stated in the said law. That on the 8th day of April, in the same year, an order was made to confirm the previous order to revive.

And this defendant insists that the said order to revive, and the order to confirm the same, were wholly illegal and void, and all the depositions taken in the intermediate time were illegally and unlawfully taken, and the depositions ought not to be heard in this case. That on the 20th day of July, 1833, an interlocutory order was made, referring it to Alexander Wurts, one of the masters of this court, to take an account, and, on the 18th day of July, 1834, an order was made substituting Andrew Miller as master, instead of the said Alexander Wurts, and, on the same day, this defendant, having been informed, accidentally, of the said proceedings, and never before having had the slightest idea but that the said suit was ended, made an affidavit, and applied to the court and obtained an order for the complainants to show cause why the said decree and all proceedings should not be set aside or opened. On the 15th day of October, 1838, an order was made that this defendant should bring on the argument of the rule to show cause at the next term, or that it should be discharged. And on the 22d day of January, 1839, an affidavit was made of the service of a copy of the before-



---

Williamson v. Adm'rs of Johnson.

---

mentioned rule, and an order made discharging the said rule to show cause, on the same day. On the 4th day of September, in the same year, a report was made, and, on the 12th day of October, in the same year, a decree was made, which was opened in the term of July last, and this defendant permitted to answer, as by the said several proceedings, to which this defendant begs leave to refer, will more fully and at large appear.

And he insists that the said proceedings were and are void—in the first place, because the complainant had leave to amend only on condition of paying costs, which he never paid, or took any measures to pay; in the second place, that he never warned this defendant to appoint a solicitor in the place of the said Richard Stockton, or gave this defendant any notice of the said proceedings, although he lived within five miles of the residence of the solicitor of the complainant; in the third place, the suit abated on the death of the complainant, and the order for revivor was utterly void, and the order subsequently made to confirm the same was also void, as not pursuing the act and not amending the complainant's bill and order on defendant to answer the same, and the order discharging the rule to show cause was irregular, and all the subsequent proceedings ought to have been vacated and set aside. And he saith that the money which he recovered of the said complainant belonged to him, as administrator of the said William Williamson, who died intestate, in the state of Kentucky, leaving issue—Abraham, William, Richard, John, Samuel, Cornelius, Margaret Wilson, Mary Smoot, and Micha Bailey, his next of kin. That the said Abraham, in his own behalf, and holding letters of attorney from some of the other heirs of William Williamson the younger, issued a citation in the Orphans' Court of the county of Hunterdon, returnable in the term of October, 1824, to show cause why his letters of administration should not be revoked, and obtained a decree to that effect, and to the term of February, 1825, issued a citation out of the same court for this defendant to account, and the said proceedings are still pending, Nathaniel Saxton, the solicitor for the complainant, being the attorney of the said Abraham Williamson, and thus harassing this defendant with a double and conflicting claim.

And he further saith, that while the said proceedings were

---

Williamson v. Adm'rs of Johnson.

---

pending against him, at the instance of the said Abraham Williamson, by his attorney, Nathaniel Saxton, and when he supposed that the suit in chancery, instituted by the complainant, was ended, he endeavored to free himself from the other demand, and accordingly, on the 28th day of September, 1831, he paid to the said Micha Bailey and Thomas Bailey, her husband, (which said Micha was one of the children of the said William Williamson the younger,) her full distributive share of the said estate, and took their receipt therefor; and on the 30th day of September, in the same year, he paid to Mary Smoot, another child of the said William, the full amount of her distributive share, and took her receipt therefor; and on the 2d day of March, 1833, he paid to Joseph Williamson, the attorney in fact of the said Abraham Williamson, William Williamson, Richard Williamson and John Williamson, and of Perry Weakley, administrator of Samuel Williamson, Cornelius Williamson and Margaret Wilson, the other children of the said William Williamson, and next of kin, and took his receipt for their several distributive shares.

And he further saith that, at the time he made the said payments of the distributive shares to the said Thomas Bailey and Micha, his wife, Mary Smoot, Abraham Williamson, Richard Williamson, John Williamson and William Williamson, and Perry Weakley, administrator of Samuel Williamson, Cornelius Williamson and Margaret Wilson, severally, he fully believed that the suit, so as aforesaid instituted against this defendant by the said complainant, was ended, and was wholly ignorant that it lay in waiting to be sprung upon him as soon as the contest with the heirs and distributees of the said William Williamson was ended.

And he further saith that the said Thomas Bailey and Micha, his wife, Mary Smoot, Abraham Williamson, Richard Williamson, William Williamson and John Williamson, and Perry Weakley, administrator of the said Samuel Williamson, Cornelius Williamson and Margaret Wilson, or their legal representatives, if any of them be deceased, severally, ought to be, but are not, made parties to the said bill; and he claims the same benefit as if he had pleaded such want of parties in this case.

---

Williamson v. Adm'rs of Johnson.

---

The order for closing testimony was enlarged from time to time, on application of complainants, until thirty days from the 11th November, 1842.

Peter Williamson, whose deposition was taken *ex parte* on the part of the complainant, being called by the defendant for the purpose of cross-examination, being duly sworn, saith—I shall be 79 years old on the 24th of July next; my uncle William removed from New Jersey before my recollection; he was at my father's a long while ago; I forget whether I was married or not; it was after my grandfather's death; my grandfather died before my recollection; I don't know exactly whether it was before my father sold my grandfather's property or not; I was grown up; it was said he came up to get money of my father, as executor of my grandfather; I don't know whether he got money the first time or not; whether he got the money the first or second time he came, I cannot recollect, but I once wrote a receipt; I don't know how long it was between the first and second time he came; I think he lived in Virginia when he came the second time; never brought any of his family with him, but came alone both times; when he came the first time, I lived in Amwell, with my father, and don't know but I did the second time; I lived with my father one year after my marriage; I think I was married in my 22d year—my first marriage; I then moved to Six Mile Run, near Brunswick; I lived there two years; then went to my father's, and in two or three weeks moved on the old homestead farm; I lived there a considerable time; don't know whether I lived there when it was sold by master Linn; it is thirty-three or four years, I think thirty-three years, since I moved away from the homestead; all this I could tell exactly if at home; when my uncle William came the second time, I lived on the old place—the old homestead; I remember this by the fact that he went with me at that time to grandmother De Hart's burying; my grandmother's name was Micha; she was buried at Six Mile Run; I think my uncle William was in about a month, but can't be positive as to the time; he stayed at my father's the principal part of the time while he was in; I should not like to be right sure whether the receipt I spoke of was given the first or second time, nor do I remember the sum, nor whether I saw any mo-



ney paid ; the receipt was for his legacy ; I wrote the receipt—uncle William signed it ; there was some little dispute about it by my father ; I wrote a receipt first ; my father did not like it, and stated his objections ; it was burnt, and he told me how I should write it ; uncle William signed, or made his mark ; he sat by when I read it ; am not sure whether he signed or made his mark—think he signed it ; am not sure whether he could read writing or not, but he looked at it as if reading, a considerable time ; John Hull, who married my aunt Margaret, was present at the time ; nobody but us three and aunt Margaret and uncle John were present at the time ; I don't now remember of anybody else being present at the time ; I read the second receipt aloud in the presence of uncle William and the others ; this took place at John Hull's house ; I asked my father, at his own house, which is  $4\frac{1}{2}$  miles from the homestead, why the business could not be done at home ; he said it could not, but must be done at Hull's ; that uncle Bill would be there ; uncle Bill was not present at this conversation between me and my father ; John Hull lived on a lot which I believe belonged to his wife, aunt Margaret, about a half mile from the homestead ; the receipt was given after the funeral of Micha De Hart ; I think the receipt was in full of uncle William's share of grandfather's estate ; there was money handed about, but I do not now recollect the amount ; don't know that uncle William owed father anything, or that father ever paid him anything before father took the receipt home ; don't know that I ever saw it afterwards ; there has been great inquiry for it ; if I have ever seen it since, I have forgotten it ; I never showed it to Asher Williamson ; I could not show it, for I *hadn't* it ; never, that I know of, told Asher Williamson that such a receipt had been written by me and signed by my uncle William ; don't know that I recollect the amount of the receipt ; there was no other receipt given or payment made at that time, nor about that time, that I know of ; if there was, I should have wrote it, but I didn't ; aunt Micha Williamson lived with me at the old homestead, at the time of the receipt ; I expect she had a money legacy left to her by her father ; was never present at any payment to her by my father ; I recollect on one occasion hearing aunt Micha growl at her son who lived with

---

Williamson v. Adm'rs of Johnson.

---

her, and who had bought a horse with money obtained from her; she said that money would soon be gone, and I supposed she alluded to the legacy from her father; father did not pay any money, that I remember, to aunt Margaret or uncle Hull, the day of the receipt from uncle William; nor do I recollect to have seen any money paid by my father to either of them for her legacy; they might have paid it a hundred times, and I not been present; I never drew a receipt, that I remember, from John Hull and Margaret, his wife, to my father, as executor of my grandfather, for her legacy; I think if I had I should remember it, but do not remember it; I never witnessed such a receipt; I don't know of any other receipt than that from uncle William on the day that was given; at the time uncle William got the money, uncle John lived in Virginia, as was said; he was in after the second visit of uncle William; I remember that perfectly well, because he borrowed a book of me which he promised to return, but never did; don't remember how long it was after uncle William was in, that uncle John came; can't recollect whether it was about that time, or some two or three years afterwards; I was once at uncle William's and uncle John's, in Virginia; they lived not far apart; I guess it was before he, uncle William, was in; it might have been after the first time; I went there to spend money, as my father said; it was the second year after I was married; I went there to see the country; can't tell what part of Virginia it was; I understood uncle William moved away from Virginia afterwards, but whether he did move, and where he did move, I do not know; the graveyard where grandmother Micha DeHart was buried, is a mile below the present church, towards Brunswick, between the turnpike and the old road; I expect the time of her death appears upon her gravestone; don't recollect being at Joseph Kughler's tavern in Amwell, with my father and Asher Williamson, respecting the estate of my grandfather; don't know that I ever recollect seeing William Maxwell, esquire, with my father and Asher Williamson, at Kughler's; if I did, I have forgotten it; don't recollect anything about that receipt having been exhibited to Asher Williamson at Kughler's; I think if I had ever been present when that receipt was exhibited, I should now remember it; it was disputed, one spell, whether there was

---

Williamson v. Adm'rs of Johnson.

---

a receipt at all or not; Benjamin Johnson asked me about it, and I told him I recollected it perfectly well; and then Johnson and myself made a search for nearly a day among my father's papers, but could not find it; I told Mr. Johnson I was sure there was such a receipt; this was some time after my father's death; don't know that I ever had a conversation with Asher Williamson, at Pennington or elsewhere, about said receipt; don't remember being examined as a witness in the chancery suit between my father and the heirs of my uncle Cornelius; I don't remember being examined before James Linn; I remember being in Pennington once, but don't remember what took place; I am of opinion that Uriah Bonum came to uncle John Hull's while we were settling that business; I knew him; it was said that Bonum lived in Kingwood, not a great ways, two or three miles from the old place; he was considerable older than me; he is not living now; I know I lived on the homestead place several years; don't remember how many; I moved away from it before the war; can't tell whether I lived on it till it was sold by master Linn or not; I might have made this all out by writing I have at home, if I had a little notice; I moved from the place to Flemington, and kept a tavern two years, belonging to John Van Middlesworth; then I bought a house at Ricefield, in Somerset county, about  $2\frac{1}{2}$  miles from Flagtown; I got a license and kept a tavern at that house two years; I went to Ricefield in 1812; I moved from Ricefield to Amwell, where John Hill now lives; I lived there a year, and then went down to the river, near John Phillips' mill, below Lambertville; I stayed a year at Phillips' mill, then went to John Knowles', about a mile from the river, where I lived a year; I then went to the place where I now live, where I have been ever since; I think it is ten years next spring that I have been there, but I am not right sure; there was no farm to the tavern at Ricefield; I gave \$1450 for it; I got part of the money from my father to pay for it; can't say how much; guess somewhere about half of it; all this I could tell if I was home; never got any money from him since or before; how my father's property was at his decease is more than I know; but think there was more due to me if it had been divided; but we never could find his will; he made a will, I know; he died at



---

Williamson v. Adm'rs of Johnson.

---

Abraham Terhune's, near Princeton, and I always thought they knew what became of the will; Abraham Terhune married my sister; my father lived at Terhune's two years, more or less, till his death; don't know what property he had when he went to Terhune's; I don't remember that I ever told Asher Williamson that I was present at any payment from my father to uncle William, or of any such payment; if I did, I have forgotten it; there are many things asked me now which I do not remember.

And in answer to questions put on the part of the complainants, the witness further saith, (being shown a paper marked Exhibit B)—The signature Peter Williamson, as a witness, on the paper, is my signature; don't know Uriah Bonum's handwriting, but expect that signature is his handwriting, or it would not be there; the body of the paper is my handwriting, and so is the name of Margaret Hull; she made her mark, not being able to write; I don't know that I have any recollection of the occasion when that paper was made; I guess it was not at the time uncle William gave his receipt at John Hull's; I remember that I made a mistake in the date; I wrote it the first day of the month; father said it was the second, not the first, and I immediately made the alteration; the paper was executed the very day it bears date; I saw John Hull sign it, and Margaret Hull make her mark.

And in answer to questions put on the part of the defendant, the witness further saith—The receipt marked Exhibit B was made at John Hull's house; I think my uncle William was not present; it was done some time after he went away the last time; can't tell how long it was after uncle William went away; can't tell whether Bonum was there by accident, or whether he was sent for at the signing of Exhibit B; I remember well what Bonum said at that time; aunt Margaret was growling at the amount; Bonum said to her, you ought not to growl, it was not the fault of the executor; her father had done it; Bonum, I think, was present when uncle William gave his receipt, but can't be certain.

Abraham R. Sutphen, a witness examined on the 13th of January, 1831, on the part of the complainants, being called, on a cross-examination on the part of the defendant, the said

---

Williamson v. Adm'rs of Johnson.

---

defendant protesting that the said examination was illegal, and not waiving any objection thereto, saith—I am about sixty years of age; I took out letters of administration of the estate of Samuel Williamson, deceased; I was not at all related to him; was not a creditor, nor had any concern or interest in the estate; it is so many years ago, I do not recollect at whose instance I took out the letters; I believe it was at Benjamin Johnson's request; can't say who paid the expenses of the administration; I have not got the letters, and do not know where they are; I was a very distant relation of Benjamin Johnson's, so far that I am not able to say what the relationship was; don't recollect anything of authorizing a bill to be filed for me as administrator of Samuel Williamson, against Asher Williamson and others; don't recollect ever seeing counsel in the matter; it appears to me that there was a little estate of Samuel Williamson; it was a trifle anyhow, and I don't recollect now what it was; I never knew the handwriting of William Williamson, the brother of Samuel, or of Peter Williamson, the son of Samuel, or Uriah Bonum; never saw any one of them write; I saw a receipt purporting to be given by William Williamson to Samuel Williamson, executor of William Williamson, deceased; I don't recollect the exact sum; it was in pounds, and was over a hundred pounds; don't know whether it was genuine or not; I thought it was—it appeared so; the receipt was for a hundred and thirty-some pounds; I saw the receipt in 1827 or 1828, I think, but can't be certain as to the time; I think something has passed between Asher Williamson and me about the receipt, but what it was I cannot say; don't recollect that Asher Williamson ever admitted to me that the receipt was genuine, or that he had any knowledge of it; I recollect hearing Asher Williamson say that if they could find such a receipt he would be willing to pay it, provided he could be clear in so doing; he said he didn't believe there was such a receipt; I cannot tell when or where this conversation was, or whether any person was present; I knew Peter Williamson by sight for some time; I know nothing about his character for truth and veracity; I have been out of the neighborhood for many years.

And being examined further on the part of the complainants,

---

Williamson v. Adm'rs of Johnson.

---

saith—I recollect further, that in a conversation between Asher Williamson and myself, Mr. Williamson said that if there was a receipt, Benjamin Johnson ought to have the money back again; and he certainly admitted to me that there was such a receipt; I can't remember whether the conversation now alluded to was before or after I filed the original bill with Benjamin Johnson against Asher Williamson and others; it was after we went to Terhune's to look for the receipt.

[A copy of deed from Benjamin Johnson to William H. Johnson and Clarissa Johnson was produced and offered on the part of the defendant, and marked Exhibit No. 1.]

William H. Johnson, a witness who was examined on the part of the complainant on the 11th of January, 1831, in the lifetime of his father, and being now cross-examined on the part of the defendant, the defendant excepting against the legality of his evidence, and not waiving any exception thereto, and the witness desiring to be excused, inasmuch as he was a party in the cause, being duly sworn according to law, saith—I am one of the grantees in this deed (Exhibit No. 1 being shown him); the three tracts described in Exhibit No. 1, are the same three mentioned in the sheriff's levy in Exhibit No. 2; that was all the land belonging to my father, excepting a wood-lot of about nine acres, called the Field lot, which was sold after his death by his administrators; John T. Neely married Clarissa Johnson, the sister of the witness and the other grantee mentioned in Exhibit No. 1; Clarissa and myself were the only children of Benjamin Johnson; my sister and myself became the purchasers at the second sale made by Edward Welsted, sheriff of Hunterdon, mentioned in the pleadings in this cause; we paid the purchase money to Mr. Welsted, also mentioned in said pleadings; the money I borrowed—some of my uncle, Lawrence Hann, of Morris, and some of my father-in-law, Jacob Case, of Hunterdon; the case was instituted to recover back such amount of money as should appear was not due on the judgment; in respect to the receipt mentioned in my principal examination in 1831, I did not know the handwriting of Williamson or Uriah Bonum; I never saw either of them write, nor never knew either of them; could not say as to the handwriting of the body of the receipt; can't say whether the name



---

Williamson v. Adm'rs of Johnson.

---

of Peter Williamson or Uriah Bonum were subscribed as witnesses thereto, but do recollect that the name of William Williamson, as signer of the receipt, was there; I never employed counsel in the case during my father's life, nor did I ever advance money to my father to employ counsel with; I did not authorize my father to institute the suit.

Question by Mr. Saxton.—Had you ever a conversation with Asher Williamson respecting this case, and the payment by Samuel Williamson to his brother William?

[Question objected to by Mr. Wall, insisting that it is unlawful, and that the witness is not competent to testify to any new matter in this case.]

Witness.—Asher Williamson and Neely and myself had a conversation, on the porch of the county tavern at Flemington; I and my brother-in-law felt anxious to settle, and thought we could settle; Mr. Williamson said he understood there was such a receipt, and he was willing to settle, if he could satisfy the heirs; he never made any objection to the genuineness of the receipt, nor did I ever hear any such objection before to-day; this conversation was after the death of my father, but how long after, I cannot tell; my father died in August, 1831, I think.

Question by Mr. Saxton.—Did not Abraham Williamson, who professed to be the son of William Williamson, tell you, some time after you saw the receipt, that it could not be produced?

[Mr. Wall objected to the question, as unlawful, and that the witness is incompetent.]

Witness.—He did, and defied us to produce it, and said if we could produce it, it should be paid.

James S. Manners, called on the part of defendant, being duly sworn, saith—

Question by Mr. Wall.—What is the general reputation of Peter Williamson, the witness who has been sworn in this case, in the neighborhood where he lives, for truth and veracity?

[Mr. Saxton objects to the question, insisting that it ought to be, What is his general reputation for truth and veracity, under oath as a witness?]

Witness.—I have never lived exactly in the neighborhood of

---

Williamson v. Adm'rs of Johnson.

---

Mr. Williamson ; I believe Mr. Williamson is allowed to talk a little at random, as some of the rest of us do, sometimes ; I have frequently heard his general reputation for truth and veracity doubted, but with what propriety, I cannot say ; I lived, till this spring, between six and seven miles from the old homestead farm of William Williamson, and about nine miles from Flagtown, and eleven and a half miles from Ricefield, and not more than six miles from where he, Peter Williamson, has lived the last ten years ; we lived in the same township, during the last ten years, until the township was divided, about three years ago ; that division threw me into Raritan, and left him in old Amwell township ; since last spring, I live within about four miles of him ; I have known him thirty-five, certainly—perhaps forty years ; this has been his reputation, with some people, during the whole time I have known him ; personally, Mr. Williamson has always treated me well, and there has always been the utmost kind feeling between us.

And being cross-examined on the part of the complainants.

Question by Mr. Saxton.—Have you ever heard a respectable, reputable man say that Peter Williamson was not to be believed under oath, as a witness ?

Answer.—I have heard a respectable man say that there was a case in which he tripped, and he, the person who spoke, knew it ; I mean by tripped, swore falsely.

Question by Mr. Saxton.—Was that man interested in that case ?

Answer.—No, not at all—no connection with it.

Question by Mr. Saxton.—Did you ever hear any other man say that he knew it ?

Answer.—No ; not that they knew it, but that they doubted the truth of what Williamson had said under oath, as a witness in any other case than the one before mentioned ; I never heard anything against his general character for truth and veracity, under oath, in relation to any other case than the one mentioned ; that case was on his application for a pension from the United States, as a revolutionary character ; Henry Gulick, Williamson's brother-in-law, was the man who said Williamson had sworn falsely, and he knew it ; he said they were boys together, and he knew Williamson's statement was not so ; he

---

Williamson v. Adm'rs of Johnson.

---

told me at my house ; I have heard a great many who spoke about it express the same opinion ; I never heard any one speak about it who did not say he doubted the truth of Williamson's story ; Henry Gulick was the only one I ever heard say he knew that Williamson's statement was false ; I heard Peter I. Clark say that he doubted that Williamson was entitled to the pension ; Mr. Clark received Williamson's pension for him at Trenton, as he told me on the way up ; I do not know that I could name any other person who expressed the same opinion, but whenever I have heard any one talk about it, they have always expressed the same opinion ; I do not know that Henry Gulick ever saw Williamson's affidavit for a pension ; he went upon the presumption that Williamson had made affidavit to sufficient service to draw a pension, and he said that he knew that he was not out more than two months.

George Holcomb, a witness produced on the part of the defendant, being duly sworn, saith—If I live to see December 7th, I shall be seventy-one ; I have been in the mercantile and milling business together ever since I was a little rising twenty, till within twenty years back ; I lived in the county of Hunterdon all the time but about five years during the war, when I lived in New Brunswick ; I am acquainted with Peter Williamson, the son of old Samuel Williamson ; I lived within about two miles of him until about a year or two before I went to New Brunswick, in 1810 or 1811.

Question by Mr. Wall.—What is and has been the general reputation of Peter Williamson in the neighborhood where he has lived, among his neighbors, for truth and veracity ?

[Mr. Saxton objects to the question.]

Witness.—Not good ; his character, generally, is decidedly bad ; a man of no truth.

And being further examined on the part of the complainants, the witness further saith—Can't say I ever heard that he could not be believed under oath ; I have had great dealings with him, and found him a man void of principle and truth ; I once lent him \$1250 to pay off a mortgage which one Whitenack had against his property ; he gave me a bond and mortgage for the amount ; he took the money and appropriated it to other purposes, never paying off Whitenack's mortgage, and I



---

Williamson v. Adm'rs of Johnson.

---

lost the whole of it ; it was \$1200 or \$1250, I forget which ; this was while I lived in New Brunswick.

William Rake, a witness produced on the part of the defendant, being duly sworn, saith—I was sixty-four the 13th of last June ; I have always lived in the county of Hunterdon, except three years, when I lived in the county of Philadelphia ; I lived about  $2\frac{1}{2}$  miles from the farm where Williamson lived, until Williamson left the county, except about a year or so at the latter end of the time I lived at Flemington, about seven miles from him ; I was constable at Amwell seven years of that time.

What was and is the general reputation of Peter Williamson among his neighbors, for truth and veracity ?

Witness.—It stood very bad for both truth and honesty, and has done so ever since I first knew him, which was before he moved on the old homestead farm.

By agreement of counsel Mr. Rake states—I went yesterday to the burying-ground described yesterday by Peter Williamson, to see the gravestone of Micha De Hart ; I took a young man with me from Six Mile Run ; we found her gravestone, but the date of her death was not on it ; I then went to the daughter of Micha De Hart, Sarah De Hart ; she produced an old Dutch Bible, which she said was the family Bible, containing the family record of births and deaths ; the old lady's death was there recorded ; it was 14th of March, 1790 ; I told her it was the grandmother of Peter Williamson I wanted to know about ; she said that was the lady.

And being cross-examined on the part of the complainants, the witness further saith—I have heard something said against the character of Peter Williamson as a witness under oath ; he was called on a trial once at Sergeantville, and swore there to what the people of the neighborhood generally said they believed was not true ; I know of no other instance where his truth under oath was questioned ; don't recollect what he swore at Sergeantville.

Charles Bartles, a witness produced on the part of the defendant, being duly sworn, saith—The receipt I spoke of on my former examination, I think purported to be signed by William Williamson ; I don't recollect whether the name was signed

---

Williamson v. Adm'rs of Johnson.

---

or a mark made; I did not know the handwriting; was not acquainted with the parties, and knew nothing about it; I don't know who signed as witness, nor whether it was genuine; all I knew about it was that there was such a paper; Abraham Williamson was a client of Col. Saxton's in another suit against Asher Williamson, at the time mentioned in my former examination; that was a suit in chancery, returnable April Term, 1825; there was also a proceeding on citation, issued out of Hunterdon Orphans' Court by Abraham Williamson against Asher Williamson, administrator of William Williamson, deceased, returnable February Term, 1825; my impression is, that there was a proceeding in Hunterdon Orphans' Court by Abraham Williamson, in which Mr. Saxton was his counsel, to revoke the letters of administration of Asher Williamson, administrator of William Williamson, deceased; don't recollect whether there was a decree revoking the letters or not; all the time which I mentioned on my former examination, during which Abraham Williamson was at the office of Col. Saxton, I think he was a client of Col. Saxton's.

And on a cross-examination on the part of the complainants, he further saith—I was not acquainted with the handwriting of William Williamson; I am still of the same opinion that I was on my former examination, that Abraham Williamson stole the receipt therein mentioned; I do not know what became of that chancery suit; I think Abraham did not prosecute either of the suits against Asher after the receipt was missing.

The counsel of the defendant presented a receipt from Mary Smock to Asher Williamson, administrator of William Williamson, deceased, dated September 30th, 1831, which was marked "Exhibit 6 for the defendant;" handwriting of Elisha Warford admitted.

Also a receipt from Thomas Bailey and Micha Bailey to Asher Williamson, administrator of William Williamson, dated September 28th, 1831, which was marked "Exhibit 7 for the defendant;" handwriting of Elisha Warford admitted.

Also a copy of the letter of administration granted in Kentucky to Perry Weakley, of Margaret Wilson, Samuel Williamson and Cornelius Williamson, which was marked "Exhibit 8 for the defendant."

---

Williamson v. Adm'rs of Johnson.

---

Also a power of attorney from Perry Weakley, administrator of Margaret Wilson, to Abraham Williamson, which was marked "Exhibit 9 for the defendant."

Also a power of attorney from William Williamson and Richard Williamson to Abraham Williamson, which was marked "Exhibit 10 for the defendant."

Also a letter of administration granted to Abraham Williamson, in Kentucky, of the estate of William Williamson, deceased, which was marked "Exhibit 11 for the defendant."

Also a power of attorney from John Williamson, of Ohio, to Abraham Williamson, which was marked "Exhibit 12 for the defendant."

Also a certified copy of the letter of administration of William Williamson, deceased, granted in Scott county, Kentucky, to Abraham Williamson, which was marked "Exhibit 13 for the defendant."

Also an affidavit taken by John Williamson, in the State of Ohio, which was marked "Exhibit 14 for the defendant."

Also a power of attorney from Abraham Williamson to Joseph Williamson, which was marked "Exhibit 15 for the defendant."

April 14th, 1842, Joab Stout, a witness produced on the part of the complainants, being duly sworn, saith—I am acquainted with Peter Williamson, and have known him thirty years; he now resides about a mile and a half from my present residence, and has resided there, as I suppose, a dozen years; I cannot say particularly what is his character as a man of truth and veracity in the neighborhood where he resides; I had dealings with him, and we always came out right; I found him well enough; I should believe him under oath; I don't know anything to the contrary of his being believed under oath in his neighborhood.

And being cross-examined on the part of the defendant, saith—When I first knew Peter Williamson he lived somewhere about the Neshanic, about a dozen miles from me; I then had no particular acquaintance with him; I became more particularly acquainted with him during the last dozen years; he has often been at my house during this time, but I have never been in his house; I hired his boy once of him, and we settled, and had no difficulty about it, and I had no scruple but what he settled fair; I have had no other business transaction with him but



---

Williamson v. Adm'rs of Johnson.

---

this; I don't think that I have ever heard his character for truth or veracity impeached; I should not object to him if I had a suit pending; his boy worked for me about a month; Williamson and I are very intimate and friendly; I frequently talked with him as he would be coming along by my house, but there has been very little visiting between us; I am a farmer, and hired the boy to work on the farm; I never knew of Williamson being sworn in a cause as a witness; I never heard any of his neighbors express any opinion, one way or the other, as to his being believed under oath.

Peter Snook, a witness produced on the part of the complainants, being duly sworn, saith—I am acquainted with Peter Williamson, and have known him twenty years; for a dozen years or more he has lived within a mile and a quarter from my residence; our land is about two or three hundred yards apart; I know nothing of his character for truth and veracity in his neighborhood but what is right; he would make promises sometimes which he would not perform, but that is common; I have had dealings with him for twenty years, off and on, and when he got the money he would pay it; I know nothing of him but what was honest.

And being cross-examined on the part of the defendant, saith—I follow milling; not now myself, but my son does, but I have followed it these forty years; my principal dealings with Williamson have been for grain and flour, at the mill; I have had other dealings with him, but I cannot recollect what they were, exactly; we were very intimate as neighbors; he is frequently at my house, and I at his; when I spoke of his not performing his promises, I meant his promises to pay money for things he had got; he never disputed his account; I never heard any of his neighbors impeach his honesty, truth or veracity; I don't recollect that I ever heard any of his neighbors talk on the subject of his being a man of truth or not; I don't know of there being any reports in the neighborhood about him as a man of truth; I can remember better what happened thirty years ago and more than what happened lately.

I had dealings with Williamson before he moved where he now lives; that is the reason why I came to know him so well; I never knew him to be examined as a witness in a cause in

---

Williamson v. Adm'rs of Johnson.

---

court; I never heard his character discussed in any way in his neighborhood.

Andrew Stillwell, a witness produced on the part of the complainants, being duly sworn, saith—I am acquainted with Peter Williamson; have been particularly acquainted with him for thirty years; more particularly for the last twenty years; for the last twelve years our premises joined, but for two or three years of this time Williamson did not live on these premises; this was in the township of Amwell; I moved from there the fifth of April instant, to the city of Trenton; I believe the character of Williamson in the neighborhood where he lives stands pretty fair; I know nothing against it.

And being cross-examined on the part of the defendant, saith—Williamson's dwelling-house was about half a mile from mine; Williamson and I are on intimate terms as neighbors; have always been friendly; he was very frequently at my house, and I have often been at his; we have had considerable business transactions together.

And being again examined-in-chief on the part of the complainants, saith—I have heard the character of Williamson, as to truth and veracity, talked about since the service of the subpoena in this cause—talked about by his present neighbors; his character was favorably spoken of, and it seemed to be a matter of surprise that his character was brought in question; I have never heard anything said against his character in his neighborhood, for truth and veracity, in anything serious; I have never heard his character for truth and veracity questioned till this suit; I may have heard some things said against his character in jest; very few escape this; I cannot state what I have heard said against him, even in jest, but have heard him talked about; think I have heard him lightly spoken of in jest but cannot say when, or by whom; have never heard his word brought seriously in question.

And being again cross-examined on the part of the defendant, saith—When I have heard him spoken of in jest it would be his endeavoring to excite levity and merriment; when people spoke of him thus, I suppose they spoke as they thought; believe this is the only way in which I have ever heard his moral character lightly spoken of; believe I have never heard any

---

Williamson v. Adm'rs of Johnson.

---

reports in his neighborhood affecting his moral character ; his want of punctuality in his payments I have heard talked of ; can't tell all of the neighbors that have expressed surprise since the service of the subpœnas in this cause, at his veracity being questioned ; I have heard my nearest neighbors, Andrew H. Quick, William Bodine, Jacob Reed, of New Market, a mile from Williamson's ; Benjamin Price, of the same place ; David Larew, also of the same place, a married man about 23 or 24 years of age ; William Young, near Snyder Town—all these, and I think several others, whose names I cannot now recollect, I have heard express surprise at his character for truth being questioned, and we all agreed that we would be willing to take his oath ; Samuel Larew, the father of David Larew, also expressed the same opinion ; I was subpœnaed last fall in this cause, and it is since that time I have heard these persons speak of Williamson as above stated ; the conversation was introduced in consequence of the service of the subpœnas, but can't state particularly how the conversation was brought about ; I suppose it was known that Williamson's veracity was brought in question because of the service of the subpœnas ; the subpœnas did not state anything about his veracity ; William H. Johnson, one of the complainants, served the subpœnas, and stated that he wanted witnesses to sustain the character of Williamson ; this, Johnson told me, when he served a subpœna on me.

Daniel Larew, a witness produced on the part of the complainants, being duly sworn, saith—I am acquainted with Peter Williamson ; have known him as long as I have known any one—about 45 or 46 years ; lived in the same neighborhood with him about 25 or 26 years ; he moved out of this neighborhood more than twenty years ago ; during his residence there I never heard anything contrary to his being a man of truth and veracity ; since that period I know nothing against his character for truth and veracity.

And being cross-examined on the part of the defendant, saith—I don't recollect where Williamson moved to after he left my neighborhood ; for a few years after he left my neighborhood, I saw him frequently, but have not seen him often for several years last past—perhaps two or three times for the last twelve years ; when he lived in my neighborhood, I don't know that



---

Williamson v. Adm'rs of Johnson.

---

I ever heard his character for truth and veracity talked about ; don't know as I have heard his name mentioned for several years back ; I might have known him to be sworn as a witness in a cause, but don't now recollect.

Uriah Sutton, a witness produced on the part of the complainants, saith—Peter Williamson lived in my neighborhood, about three miles off ; he lived there when I first remember, and moved away between twenty and thirty years ago ; I was personally acquainted with him, but not very intimate ; there was not a great deal of intercourse between us ; we were friendly when we met ; don't recollect ever hearing his character for truth and veracity scrupled at that time in the neighborhood ; don't recollect ever hearing it brought in question, or hearing anything about it ; know nothing about it of my own knowledge ; think Uriah Bonum died in the spring of 1809.

William Young, a witness produced on the part of the complainants, being duly sworn, saith—I am acquainted with Peter Williamson ; have been acquainted with him about thirty-five years ; I now live about a mile and a half from him, and have so lived for about twelve years past ; before this, he lived about a mile further up in the mountain, in the neighborhood ; he has lived in the neighborhood about fifteen years, more or less ; his character stands about like the commonalty of people ; I have heard nothing against it, for my part ; never heard anything against his character for truth and veracity before he came into this neighborhood.

And being cross-examined on the part of the defendant, saith—I never heard anything in the neighborhood, one way or the other, about his character for truth and veracity ; he and I are on intimate terms as neighbors.

Andrew H. Quick, a witness produced on the part of the complainants, being duly sworn, saith—I am acquainted with Peter Williamson ; have been acquainted with him for about twenty years ; live within three-quarters of a mile from him, and have so lived for about ten or twelve years last past ; for one or two of the twenty years spoken of, he lived out of the neighborhood—for the rest of the time, in it ; I don't know but what his character for truth and veracity in my neighborhood is good ; have never heard it condemned ; don't know that I

---

Williamson v. Adm'rs of Johnson.

---

ever heard anything against his character for truth and veracity before or since he has been in my neighborhood.

And being cross-examined on the part of the defendant, saith—I have never heard his character for truth and veracity brought in question one way or the other, till these subpoenas were served in this cause; William H. Johnson, one of the complainants, served a subpoena on me, and said he wanted me to prove the veracity of Peter Williamson; have had a little dealing with Peter Williamson; not a great deal; he has had grain and flour of me sometimes; he and I are on intimate terms; not visiting often; he frequently calls at my house, and I have been often at his; I am not quite thirty-nine years of age.

And being again examined-in-chief on the part of the complainants, saith—Since the service of the subpoenas in this cause I have heard nothing against his character for truth and veracity.

Jacob Reed, a witness produced on the part of the complainants, being duly sworn, saith—I am acquainted with Peter Williamson; have known him for the last fifteen years; I live about a mile from him, and have so lived for the last ten or twelve years; had some little acquaintance with him before he came to my neighborhood; don't know but what his character for truth and veracity stand fair as far as I know or have heard; have heard nothing said against his character for truth and veracity till after the subpoenas were served; since their service I have heard nothing said against his character for truth and veracity; have never heard that his character for truth and veracity was ever questioned in any other case than in this cause.

And being cross-examined on the part of the defendant, saith—Mr. Johnson, one of the complainants in this cause, told me that his truth and veracity was impeached when he subpoenaed me; Williamson and I are on friendly and intimate terms.

Philip Rake, a witness produced on the part of the complainants, being duly sworn, saith—I am acquainted with Asher Williamson, the defendant in this cause; have been acquainted with him thirty or forty years; Cornelius Williamson and I were securities on his bond as administrator of William Williamson, deceased; he came to my house one day and wanted me to go with him to the surrogate's office to be one of his securities as above; I told him it likely would not be settled

---

Williamson v. Adm'rs of Johnson.

---

in a great while, and I did not like it much ; he said he did not know as it would make a great deal of difference, for he would soon settle it up ; I asked him what amount of estate there would be ; he said he did not think there would be over four or five hundred dollars—it might reach five ; so I went up with him and became one of his securities, as stated ; I was acquainted with Abraham Williamson, said to be the son of William Williamson, deceased ; he came to this state about the year 1825 ; he said he came from Kentucky ; I heard Asher Williamson, the defendant, say there was not more than three, four or five hundred dollars coming to this Abraham Williamson, from Kentucky, if he, the said Abraham Williamson, would settle right, and that he need not make such a fuss about it ; when Asher said there would not be more than three, four or five hundred dollars coming to Abraham Williamson, I did not know whether he meant the share coming to Abraham or to all the heirs of William Williamson; deceased ; nothing was said about that ; the three, four or five hundred dollars spoken of by Asher Williamson to me, I took to be coming from the estate of William Williamson, deceased, and that this would settle the whole estate, but I can't say that Asher said so.

Question by the counsel for the complainants.—“ Had you any conversation with Abraham Williamson about the existence of a receipt given by his father, William Williamson, to Samuel Williamson, executor of William Williamson the elder, deceased ?” [This question objected to by the counsel for the defendant.] Witness answers that, on a certain occasion, Abraham Williamson called on me to go with him to Mr. Saxton's office, and said he would show me the amount he demanded ; I went up with him, and as we were going along he said if that devilish receipt was out of the way, he would then recover a large sum of money ; in a few days, or a week, afterwards, he called at my house and said that that receipt was gone, and now he could recover a large sum of money ; Asher Williamson and I once talked about this receipt, and he said if there was such a receipt, it was a forged one, and he thought Peter Williamson had forged it, or helped do it, anyhow ; this conversation with Asher, I think, took place after Abraham Williamson told me the receipt was gone.



---

Williamson v. Adm'rs of Johnson.

---

And being cross-examined on the part of the defendant, saith—I can't say where Asher and I were when he talked about the receipt; I don't know that Abraham Williamson was a son of William Williamson, or whose son he was; I don't know what accounts there were to settle between Asher and Abraham Williamson; my wife was present when Abraham Williamson told me that the devilish receipt was gone; think I went to the surrogate's office to be security for Asher, as the administrator of William Williamson, the day after he spoke to me to go there; think he called for me, and we all went up together; there was no one present but my wife, when Asher spoke to me to be his security; don't know that Asher told me, at this time, that he did not know what the amount of the estate would be; think we gave bond in \$2000; I have never been called on to pay anything as security for Asher.

William Stout, a witness produced on the part of the defendant, being duly sworn, saith—I have lived all my life, in the old township of Amwell, including, now, the townships of Delaware and Raritan; I am now in my 62d year; for thirty years past, I have followed farming; previous to that, blacksmithing; I hold now, the commission of justice of the peace for this county; have held the office of justice of the peace between fourteen and fifteen years, and that of judge, four or five years; I am acquainted with Peter Williamson, spoken of by the preceding witness; have known him between forty and fifty years—perhaps forty-five years; lived two miles and a quarter from him, for six years, and, while I thus lived, did his work for him, as a blacksmith, and had an opportunity of seeing him two or three times a week; I then lived in the present township of Delaware; during this time, I was intimately acquainted with him; this was from 1803 to 1809; after this time, I moved to my present residence, in Amwell, and he to Somerset county, and our intimate acquaintance ceased; since that time, we have seen each other occasionally; when we lived in the same neighborhood together, he was not considered, at that time, a man that stuck strictly to the truth; it is a pretty hard question to solve; I do not think he always told me the truth.

His brother William told me he did not know when to believe him; that he was a man that would leave the truth;

---

Williamson v. Adm'rs of Johnson.

---

that he was his brother, and he was sorry to say it. [Objected to.]

I did a good deal of work for him, during these six years; his reputation for truth and veracity, in his neighborhood, was not the first; it was bad; he was considered a man not to be believed at all times; I know nothing about his being believed under oath; never recollect of being where he was called as a witness, and know nothing of his reputation in this respect; never heard any one say, as I recollect, that he was not to be believed under oath.

And being cross-examined on the part of the complainants, saith—I reside from Peter Williamson, at this time, about three and a half or four miles; don't hear but what his character, in the neighborhood where he now resides, is fair, though I don't hear much about him; I have had very little knowledge of him, lately, and don't know that I have seen him for five or six years; as an instance of his not being a man of truth, in his former neighborhood, he would tell you of certain performances which would never come to pass; he would never perform; he would tell what he had done, which he had not done, and promised to do other things, which he did not do; he was lively in his disposition, too, and loved to tell a good story, and make people laugh; when I worked for him, he said he would pay me at such a time, &c., but he never did, and when I broke up shop, he disappointed me as to the times of payment for my work; he came and settled the account with me, honorably and fairly, but did not pay the money, and afterwards settled with the constable, at my suit; I have frequently heard it said, in the neighborhood, that he was not to be believed—that he made promises to pay money, and would lie people out of it; I mean by this, that he made promises to pay, and would not perform them; I mean that he did not pay at the times he promised; in the neighborhood, when anything was told, and it was said that Peter Williamson told it, it was not believed; this was when I was in intimate habits with the man; I can't say how it is now; I hope he does better; the stories I refer to, were of matters that were said to have taken place among young people at his singing-school.

And being examined-in-chief, on the part of the defendant,

---

Williamson v. Adm'rs of Johnson.

---

saith—He would not have been believed in the neighborhood as to any matter, the truth of which depended on his word alone; I can't say that this reputation of his extended to any serious matters of business; I don't know of any matter of business in which he would have been believed by me or the neighbors; he might have been believed in business of importance; I can't say whether he would or not; I never knew him tried in the important matters to which I now allude.

And being again cross-examined on the part of the complainants, saith—I never heard of his reputation that if called as a witness under his solemn oath, he was not to be believed; it would depend on circumstances whether he was to be believed, in his account of a settlement between two neighbors, at which he was present; some men might have a better opinion of him than others and might believe him; I don't know whether or not it would be believed in general; it might be believed by some persons, and might not by others.

And being again examined-in-chief on the part of the defendant, saith—In what I have said of Peter Williamson's reputation, I speak of his immediate neighborhood at that time; I never heard any reputation about him at all, one way or the other, as a witness under oath, and I give no opinion myself as to his reputation under oath.

May 25th, 1842, Cornelius Lake, a witness produced on the part of the complainants, being duly sworn, saith—I had formerly some knowledge of William Williamson, the brother of old Samuel Williamson; I was small when I was acquainted with him; he lived near my father; while I was a boy he moved to the western country; he afterwards came back to this country, but I can't state the time within ten years, that I know of; I recollect the time when the Williamson farm was set up for sale; I mean the farm that was owned by the father of William Williamson; I don't recollect the name of the father of William Williamson; I am not right certain whether William Williamson came back to this country before or after the sale of the Williamson farm, but it rather strikes me it was after the sale; I don't think I had any conversation with William Williamson when he came back, but I saw him at old Mrs. Arnwine's; I heard old Mrs. Arnwine and William William-



---

Williamson v. Adm'rs of Johnson.

---

son talk about his father's estate; he was stating to her that his brother, Samuel Williamson, had offered him between 40 and 50 shillings per acre for his share; Mrs. Arnwine said she would not take it, for it was worth more; he said if he lived here he would not take it, but that the expense of coming here and a lawsuit would be so much that he did not know but what it would be as much profit for him to take it as to leave it; I don't recollect of anything else being said about the property; I don't remember of seeing William Williamson but at this one time; I don't recollect how long he remained in this country at that time; I might have seen him afterwards, but I don't recollect.

And being cross-examined on the part of the defendant, saith—I did not understand from what William Williamson said whether he would or would not positively accept of his brother Samuel's offer; I never saw him in New Jersey after this time; William Williamson did not say whether he would or would not accept of his brother Samuel's offer further than I have stated; he said nothing about it one way or the other, more than I have stated.

November 22d, 1842, Daniel Larue, a witness produced on the part of the complainants, being duly sworn, saith—I went to the western country with Asher Williamson, the defendant in this cause, in the fall of the year 1811; at this time I went with him to the house of his uncle, John Williamson; his uncle, John Williamson, lived at this time in the State of Ohio, within twenty miles of a place called New Lancaster; I am connected with the Williamson family; my grandmother was a sister of the father of defendant; in a conversation between the defendant and his uncle John, at the time spoken of, defendant proposed to his uncle John to buy his (John's) share of his father, William Williamson's, estate; this share was considered to be in the State of New Jersey; I did not hear defendant make any other offer for this share than \$40; defendant told his uncle John that there was something coming to him, but did not know how much; that he would be willing to give him \$40 at a venture for it; that there would have to be a contention for it, considerable trouble and expense, but that he would venture to give him \$40 for it; John Williamson

---

Williamson v. Adm'rs of Johnson.

---

hesitated a while about taking it—said there was considerable coming, but he did not know how he should get it; he finally concluded to take it; this was a few days before we came away; John Williamson came on with us as far as his son John's, where the writings were executed; there was no contention about John Williamson's share of his father, William Williamson's, estate, at this time; I believe the lawsuit was pretty much ended at this time; I recollect William Williamson, the brother of John Williamson, being in the State of New Jersey, from the State of Virginia, about fifty years ago; I have frequently heard the Williamson family speak of William Williamson's being here, as I have stated; I recollect seeing Abraham Williamson here about the year 1827; this Abraham Williamson was the son of William Williamson, the brother of John, and came from the State of Kentucky; heard Abraham Williamson say, when he was here, that there was a receipt from his father William, to Benjamin Johnson, for a part of his share of his father, William Williamson's, estate; I am unable to say, with certainty, who this receipt was from, or to whom it was given, but that it was in favor of Benjamin Johnson, and was in the hands of Mr. Saxton, and that he had destroyed it; have heard Abraham Williamson tell this story very frequently.

Othniel Lake, a witness produced on the part of the complainants, being duly sworn, saith—My grandmother and defendant's father were brother and sister.

The complainants here offer evidence of the declarations of defendant's father, defendant himself, his brothers and himself, and it is excepted to, so far as relates to the declarations of defendant's father and brothers.

Witness says it was always a talk amongst defendant and his father and brothers, that Samuel Williamson, from the proceeds of the first sale, had paid to the boys one hundred, and to the girls, fifty pounds, except Cornelius, who, it was said, would not receive anything; I mean the proceeds of the sale of the old homestead of William Williamson, the father of William and Samuel Williamson; it was also talked that receipts had been given for these shares; after this suit was brought, I heard the defendant say that these receipts ought to have been brought in before, when they settled; among the receipts there

---

Williamson v. Adm'rs of Johnson.

---

was one talked of for £100 given by William to Samuel Williamson; after the death of Cornelius Williamson, the father of defendant, the receipt last spoken of was talked about, and I have heard it talked of scores of times; I can't say how soon after the death of Cornelius Williamson I first heard this receipt talked about—it might have been ten years or two years; I had heard of this receipt before this suit was brought; I can't say, positively, that I ever heard defendant say anything about this receipt till after the suit was brought, and I can't say that I did not; I don't recollect that I have ever heard defendant say anything about the payment of £100 by Samuel Williamson to William Williamson; I have heard defendant's brother William speak about it, and I don't doubt I have heard defendant speak about it, but I can't recollect; it was always talked of so amongst the family; I never heard it denied; shortly after the death of defendant's father, there was a good deal of talk between my family and defendant's about the payments to the heirs of old William Williamson's estate—I mean about the payments of £100 to the boys, and £50 to the girls; Abraham Williamson, the son of William Williamson the younger, was here from the State of Kentucky, a year or two before the court-house in this county was burned in 1826–27; he said he was here to receive his father William's share of his grandfather William Williamson's estate, and he said he had a power of attorney for the purpose, and that he was the administrator in Kentucky of his father's estate; he said that his father had received £100 of his brother, Samuel Williamson, of the estate of William Williamson the elder, and had given a receipt for it; and he said he would deduct this out of his father's share, and settle with defendant; the suit was then pending between Benjamin Johnson and defendant; in a conversation between Abraham Williamson and Benjamin Johnson, Abraham Williamson said, my father has received the £100 from Samuel Williamson, and has given a receipt for it, and he was willing to deduct that out of his father's share; Johnson said it was more than £100; Williamson said it was but £100, as he had always understood from his father, and the receipt would speak for itself; some three or four months after this, Abraham Williamson came to my house, and in conversation said, Mr. Johnson



---

Williamson v. Adm'rs of Johnson.

---

has lost his claim now, but if you and I were in Flemington, behind Bonnell's big shed, under a big stone, I could show you a paper that would tell all about it; I understood him to refer to this receipt; I remarked to him that whether he had got this receipt honestly or dishonestly he ought to tell no man, for he might get into a deal of trouble by it; I never before this time heard that this receipt was lost; I never heard its existence denied till after this; he would sometimes say that Mr. Bartles had destroyed it, and sometimes that Mr. Saxton had destroyed it, and that Mr. Saxton would accuse Mr. Bartles of selling it.

And being cross-examined on the part of the defendant, says—His wife and children were present during the conversation of Abraham Williamson at his house, as he has stated; when I told him that he ought not to tell any man about the receipt, he made no reply; I recollect of hearing William Williamson, brother of defendant, talk about the payment aforesaid, to the heirs of William Williamson, and I don't recollect distinctly of hearing any other one of the family talk about it, but I have no doubt I have heard defendant talk about it, and I have never heard it denied; I have heard defendant say, since the suit was brought, that if there was such a paper it ought to have been produced at the time of the settlement; I don't recollect of ever hearing defendant say anything else than this about this payment or receipt; I have heard William, defendant's brother, talk about it, at my father's office; I think that Cornelius Williamson, the father of the defendant, died more than thirty years ago; I might have been fifteen years old at the time; I shall be fifty-one years of age the 19th January next; for aught I know, defendant and I are on friendly terms; I believe we generally speak when we meet; some years ago we had some disputes, and we had a trial at law, and I don't know whether it is settled yet or not; we have not had much intercourse since this dispute; I don't recollect distinctly of ever hearing Cornelius Williamson, the father of the defendant, talk about the payment to William Williamson and the receipt for £100, but heard him say the heirs were all paid but him, and he would not have any if he could not get more; I don't recollect particularly of hearing any of defendant's brothers besides William talk about this payment or receipt; I have heard Wil-

---

Williamson v. Adm'rs of Johnson.

---

liam talk about it more than any of the rest ; I never heard William say that he knew of his own knowledge that such a receipt had been given by his uncle William ; I don't mean to say that I ever heard any of the family say that they knew that such a receipt had been given ; I have heard my grandmother talk more about it than anybody else ; I never heard Abraham Williamson deny that such a receipt had been given by his father, but after he told me the story about the stone behind Bonnell's shed, he said if they had such a receipt, let them produce it.

In April, 1843, the cause was heard in the Court of Chancery, before William Pennington, Chancellor, and in July, 1843, an interlocutory decree was made as follows : " It appearing to the court that Samuel Williamson, the executor of William Williamson the elder, deceased, in the pleadings in this case mentioned, on the 2d day of April, 1792, paid to William Williamson the younger, in the pleadings also mentioned, the sum of £131 10s. for his share of the proceeds of the first sale of the real estate of the said William Williamson the elder, deceased, made by the said Samuel Williamson, deceased, as in the pleadings mentioned, for which said payment a receipt and acquittance, bearing date on that day, was made and given by the said William Williamson the younger, to the said Samuel Williamson, executor as aforesaid, as in the pleadings mentioned. And it further appearing to the court that the said judgment recovered in the Supreme Court of this state, on the 27th day of February, in the year of our Lord 1822, in the name of William S. Pennington, late governor, &c., to the use of Asher Williamson, as administrator of William Williamson the younger, deceased, against Benjamin Johnson, as survivor of the said Samuel Williamson, deceased, as in the pleadings likewise mentioned, was for too much money, and that the said defendant in that action was entitled to be credited for the said payment made by the said Samuel Williamson, executor of the said William Williamson the elder, deceased, to the said William Williamson the younger, on the 2d day of April, in the year of our Lord 1792, on the first sale of the property of William Williamson the elder, deceased, made by the said Samuel Williamson, executor. And the Chancellor being of opinion that the complainants in this case are entitled to the relief prayed against

## Williamson v. Adm'rs of Johnson.

the said Asher Williamson. It is, thereupon, on this twelfth day of July, in the year of our Lord 1843, by William Pennington, esquire, Governor and Chancellor of the State of New Jersey, ordered, adjudged, and decreed that it be referred to James N. Reading, esquire, one of the masters of this court, to take an account, and ascertain the sum actually due from the said Benjamin Johnson, as survivor of the said Samuel Williamson, deceased, to the said Asher Williamson, as administrator of the said William Williamson the younger, deceased, at the time of the said judgment obtained by the said William S. Pennington, late governor, &c., against the said Benjamin Johnson, after crediting the payment so made by the said Samuel Williamson, as executor as aforesaid, to the said William Williamson the younger, on the 2d day of April, in the year of our Lord 1792, above mentioned, and ascertain the excess of the said judgment over the amount so due at that time; and that the said master do compute interest on the amount of said excess, from the time of rendering said judgment, up to the date of his report; and that he make report to this court with all convenient speed; and all further equity and directions are reserved. In making his calculation, the master will deduct from the said judgment only the credit aforesaid, of the 2d of April, 1792, with interest to be computed from that date, on the same, at the rates of interest allowed, during the time, by the laws of this state, and will report, distinctly, what the aforesaid credit, with the interest thereon, amounts to, up to the date of the report."

On the 3d October, 1843, James N. Reading, master, reported the amount due to the complainants, on that day, to be \$2256.27, as by his schedule annexed to said report, to wit :

The proportion of share of moneys arising from the second sale, and net rents of the premises in the pleadings mentioned, payable to William Williamson, Jr., under the will of William Williamson, Sr., deceased, \$1,744 88

Amount paid by Samuel Williamson, executor, to William Williamson, Jr., out of the proceeds of the first sale, the 2d April, 1792, £131 10s., equal to..... \$350 66

Interest thereon, from 2d April, 1792, to the time Samuel Williamson received the



## Williamson v. Adm'rs of Johnson.

balance of moneys arising from the second sale and net rents, out of the Court of Chancery, 25th June, 1814, and gave bond—22y., 2m. and 23d..... \$545 67

————— \$896 33

Balance then due William Williamson, Jr..... \$848 55

Interest from 25th June, 1814, to 27th February, 1822, the date of the judgment by William S. Pennington, governor, &c., against Benjamin Johnson, survivor, &c..... 455 70

————— \$1,304 26

Deducting that sum from amount of said judgment, 27th February, 1822, exclusive of costs, which was.... 2,202 46

Leaves a balance or excess of said judgment, over the amount actually due Asher Williamson, administrator of William Williamson, Jr ..... 898 20

Interest thereon, from 27th February, 1822, to 3d October, 1843—21y., 7m. and 6d ..... 1,358 07

Amount due from defendant to complainants..... \$2,256 27

On the 13th of October, 1843, at a Court of Chancery held at Trenton, by William Pennington, esquire, Governor and Chancellor, it was "ordered, adjudged, and decreed that the said report, and all matters and things therein contained, be confirmed, and that the said defendant, Asher Williamson, do pay to the said complainants, William H. Johnson and John T. Neely, administrators of the said Benjamin Johnson, deceased, the said sum of \$2256.27, so reported to be due from him to them, together with lawful interest thereon, from the said 3d day of October, instant (1843), being the date of the said master's report. until paid, and that the said complainants have execution thereof by writ of *feri facias* against the goods and chattels, lands, tenements, hereditaments, and real estate of the said defendant. And it is further ordered, adjudged, and decreed that the former decree of this court, made in this cause on the 16th October, 1839, and the lien thereof on the property of the said defendant, subject thereto, stand and remain in force, to secure payment of the debt and interest aforesaid, and that the sheriff, or other officer to whom the said writ of execution shall be directed, be

---

Williamson v. Adm'rs of Johnson.

---

therein commanded, that of the goods and chattels in his county of the said Asher Williamson, he cause to be made the debt and interest aforesaid. And if sufficient goods and chattels of the said Asher Williamson cannot be found in his county, that then he cause the whole or the residue, as the case may require, of the said debt and interest to be made of the lands, tenements, hereditaments and real estate whereof the said Asher Williamson was seized on the said 16th of October, 1839, or at any time afterwards, in whose hands soever the same may then be."

From this decree the said Asher Williamson appealed to the Court of Errors and Appeals, stating in his petition of appeal that he finds himself aggrieved by a final decree made in the Court of Chancery, by His Excellency William Pennington, Governor and Chancellor of New Jersey, bearing date the 13th day of October, in the year of our Lord 1843, wherein the said William H. Johnson and John T. Neely, administrators, &c., of Benjamin Johnson, deceased, were complainants, and Asher Williamson, defendant, in this respect, to wit, that the said decree adjudged that the said Asher Williamson, the petitioner, do pay unto the said complainants, William H. Johnson and John T. Neely, administrators, &c., of Benjamin Johnson, deceased, the sum of \$2256.27, with interest thereon from the 3d day of October, in the year last aforesaid. And appealing from the said decree, upon the ground that the same is erroneous, for that the petitioner is not indebted to the said complainants in the said sum, or any part thereof, nor was he in any manner or way liable to the said complainants for the said sum of money, or any part thereof.

The cause was argued by

*G. D. Wall* and *P. D. Vroom*, for the appellant.

*W. Halsted*, for the respondents.

Cases cited by the counsel for the appellant. 6 *Johns. Ch. R.* 90; 1 *Ibid.* 51, 406; 3 *Ibid.* 351, 356; 1 *Johns. Ca.* 436; 6 *Wheat.* 109, 113; *Saxton* 29, 113; *Elm. Dig.* 3, No. 8; 6 *Johns. Ch.* 479, 481; 1 *Sch. and Lef.* 201; 1 *Johns. Ch.* 323; 7 *Cranch* 336.

---

Williamson v. Adm'rs of Johnson.

---

Cases cited by the counsel for the respondents. 1 *Spencer's Rep.* 214; 1 *Green's Ch.* 40; 5 *Hal. Rep.* 276, 277; 4 *Ibid.* 411; 1 *Mod.* 6; *Gould's Pl.* 152, 153; *Willes* 366; 4 *Johns. Rep.* 536; *Prec. in Ch.* 233; 4 *Price's Exch.* 136, 140, 126; 1 *Ves.* 289; 2 *Ves., Jr.*, 132, 135; 3 *Atk.* 224, 234; 2 *P. Wms.* 424, 426; 2 *Story's Eq.*, § 879; 1 *Wash. C. C. Rep.* 320; 2 *Hayw.* 342, 269; 1 *Dess.* 172; 4 *Ibid.* 176; 7 *Term Rep.* 269.

THE CHIEF JUSTICE delivered the following opinion :

It appears by the state of the case in this cause, (consisting of 155 closely-printed octavo pages,) that William Williamson the elder died seized and possessed of certain real estate, in this state, sometime in the year 1765, having first made and executed his will, by which he gave to his wife the use of all his estate, real and personal, during her widowhood, and after her death or marriage, directed his executors to take the same in possession and dispose of the same; that within two years after such event they should sell the lands; that out of the moneys arising from such sale, the executors, in three years thereafter, should pay certain legacies to his two daughters, and divide the residue equally among his five sons, Cornelius, Samuel, John, William and Abraham, and his two daughters, Micha and Margaret, except that Abraham should have £100 more than the rest; and appointed his sons Cornelius and Samuel his executors. That the widow lived on the premises until she died, which was in December, 1787. Cornelius, the oldest son, never proved the will, but Samuel did prove the same, on the 16th June, 1774. That on the 11th March, 1789, two years after the death of his mother, Samuel offered the farm for sale at auction, having given previous notice of such sale; that Cornelius and several of the brothers were there, but refused to bid; that Samuel directed his own son Cornelius to bid, and he did bid, for the farm, forty-two shillings the acre. Samuel, the executor, did not then strike it off; but, for want of a better offer, on the 9th of August, 1792, he conveyed the farm to his said son Cornelius, who, soon after, re-conveyed the farm to his father, Samuel. That the farm, according to the ancient deeds, contained only 290 acres, but upon a re-survey was found to



---

Williamson v. Adm'rs of Johnson.

---

contain about 90 or 100 acres more. That the testator's son Cornelius took possession of the excess, claiming it as heir-at-law. That Samuel Williamson, the executor, paid the legacies; that his brother Abraham had died intestate and without issue; and that on the 2d April, 1792, he divided the residue of the amount of sale of the said farm, at forty-two shillings an acre, into four equal parts, being £127 5s. each; and having retained one share for himself, he, on that day, paid to his brother, William Williamson, £131 10s. for his share, and took his receipt and acquittance therefor in full. That on the 30th September, 1793, he paid his brother John in part, and on the 3d of October, he paid him the balance, and took his receipt; and that he afterwards, as he alleges, settled with his brother Cornelius for his share, leaving the dispute about the surplus land unsettled. That the said Cornelius afterwards died, leaving a will, and leaving six children, viz., William, Cornelius, Asher, Joseph, Bernice, Patience and Micha. It further appears that on the 20th November, 1809, the said children of Cornelius, the brother of Samuel, filed a bill against Samuel, to set aside the sale made by him, and for an account. The case recites this bill, and the answer of Samuel to the same, which was put in on the 10th July, 1810, and the proceedings thereon; by which it appears that on the 11th of September, 1811, Chancellor Bloomfield decreed that the sale by Samuel was fraudulent and void; that the whole farm should be re-sold by him, under the direction of a master; that the sale should be reported to the court, and the proceeds should be brought into court; that the master should take an account of rents and profits from the 11th March, 1789, when Samuel took possession under his own sale, &c. That on the 24th October, 1812, the master reported that the rents and profits which ought to be charged to Samuel, amounted to \$2760; and that he ought to be allowed for improvements, \$505. Exceptions were filed by Samuel to this report, in March Term, 1813. On the — day of —, A. D. —, Samuel Williamson, under the direction of the master, sold the entire farm for the sum of \$7923.31; which being brought into court, the cause came on to be heard before Chancellor Ogden, upon the equity reserved, in September, 1813; and on the 22d October, 1813, the Chancellor made a

## Williamson v. Adm'rs of Johnson.

decree that the master should pay, out of the moneys in court, to the representatives of Cornelius, the son of the testator, William Williamson the elder, the one-fifth part of the sum of \$10,178.21, the aggregate amount of the sales last aforesaid, and of the rents and profits reported by the master, after deducting therefrom £100 given to the two daughters, and £100 given by the testator to his son Abraham, with interest from 1792, when those legacies were paid by Samuel, and after deducting also \$173.80 for the master's fees; and that the master should pay over the residue, after deducting the complainant's costs, to the said Samuel, to be by him disposed of according to the will of his father, upon his giving bond with security, &c. A re-hearing was then moved for and granted. It took place in June, 1814, before William S. Pennington, Chancellor, who, on the 11th June, 1814, decreed that the sum of \$523.33, which had been allowed to Samuel for money paid to his brother Cornelius as his share of the proceeds of the first sale, should be stricken out, so as to increase the sum due to Cornelius by that amount, and make it \$1744.88 instead of \$1221.55; and confirmed the decree in all other respects.

By the decree of William S. Pennington, Chancellor, made in June Term, 1814, the share of William Williamson was fixed at \$1744.88. For this sum, with interest from the date of that decree, Asher Williamson, as administrator of William Williamson, recovered judgment against Benjamin Johnson, and raised the whole amount on execution.

By the decree of William Pennington, Chancellor, the above sum was too much by the amount of £131 10s. paid by Samuel Williamson to William Williamson on the 2d April, 1792, with interest thereon from that time to the 25th June, 1814, the date of the decree of the first Chancellor Pennington.

The account will then stand thus :

25th June, 1814. Amount of share then decreed to	
be due William Williamson .....	\$1,744 88
Deduct from that, 1st, £131 10s., equal to.....	\$350 66
Interest at 7 per cent. from 2d April, 1792,	
to 25th June, 1814, 22y., 2m. 23d.....	545 67
	<hr/>
	896 23

Shows the decree was too much by..... \$848 55

## Williamson v. Adm'rs of Johnson.

As, therefore, Asher Williamson, as administrator of William Williamson, sued for and received of Benjamin Johnson \$848.55 too much, with interest from the 25th June, 1814, Johnson is entitled to recover back that sum, with interest from that time to the 3d October, 1843, the date of master Reading's report. The account will then stand thus—

Amount of excess decreed by Chancellor William S. Pennington, the 25th June, 1814, as William Williamson's share.....	\$896 33
Interest, at 7 per cent., from 25th June, 1814, till 4th July, 1824, (when interest was reduced to 6 per cent.,) 10 years, 21 days.....	622 15
Interest from 4th July, 1824, at 6 per cent., to 3d October, 1843, the date of master Reading's report, 19 years and 3 months.....	1183 92
	<hr/>
	\$2602 45

That there once existed a receipt or acquittance, in writing, from William Williamson to Samuel Williamson, for £131 10s., bearing date the 2d April, 1792, I am entirely convinced. It is established beyond all doubt, by the testimony of Mr. Saxton and Mr. Bartles. Their testimony was given at a time when the facts and circumstances stated by them must have been fresh in their memory.

That that writing was surreptitiously abstracted from the office of Mr. Saxton, I am fully convinced; at any rate, it has been destroyed or lost, beyond recovery, and therefore its non-production fully accounted for. I am equally well satisfied it was genuine, and not a forged or spurious instrument; and, if so, we are bound to believe that the money mentioned in it was actually paid by Samuel Williamson, according to the tenor of the writing.

It is admitted by the defendant—at least it cannot be denied, for the record proves it—that he obtained a judgment against Johnson for the whole amount of William Williamson's share of his father's estate, without any allowance for this disputed payment. It is equally true that the defendant obtained the whole amount of that judgment, with interest and costs, by a sale, under execution, of what (at least between him and Johnson) was Johnson's property.



---

Williamson v. Adm'rs of Johnson.

---

It follows, then, that the defendant actually received, as administrator of his uncle, William Williamson, £131 10s. more than he ought to have done, with interest upon it from the time it became due from his uncle Samuel to his uncle William Williamson, up to the date of the judgment, with interest, again, upon the aggregate amount from that time until he received the money from the sheriff; and, consequently, that the defendant, in fact and in conscience, now owes to Johnson the sum of £131 10s., with such accumulated interest upon it.

Johnson now seeks to recover back this money; and conscience at once asks, why should he not? The answer to this question has been given us in the shape of various objections, which have been taken and pressed with great learning and ability by the defendant's counsel.

Before I proceed, however, to consider these objections, I cannot refrain from noticing the fact that, for all that appears, the defendant has the money yet, or has applied it to his own use; at least I see no evidence on the record that he has ever paid one dollar of it to the children of William Williamson. If so, he may, in a court of equity, be fairly considered, as to this excess of payment, a trustee for Johnson; and if he pays it to him under the direction of the Chancellor, he is in no danger of being compelled to pay it over again to the children of his intestate, William Williamson.

Nevertheless, this court cannot affirm this decree, and compel the defendant to pay back the money to Johnson, unless we can do so upon sound and safe principles, settled and recognized, or at least clearly within the powers and attributes of a court of equity.

What, then, are the objections urged by the defendant's counsel? They are as follows:

1. That Johnson has no *locus standi* in court. He had no title or interest in the lands which were sold for the satisfaction of the judgment. He had conveyed the lands to William H. and Clarissa Johnson, his children, in fee, for the fraudulent purpose of defeating the judgment creditor. That that conveyance, although void as against the plaintiff in execution, was valid and effectual, to all intents and purposes, in law and in equity, as against him; that if an excess of money had been

raised by the sheriff on the execution, he must have paid it to William H. and Clarissa Johnson, and not to their father; and, consequently, he has no title to any of the money recovered on that judgment, even if the judgment was for more than it ought to have been. That if there was an error in the judgment, as that judgment was paid by the children, they, and not their father, were the persons who ought to have come here to get it back. That if he was now living, and the defendant was ready and willing to refund the money, he could not safely pay it to Johnson, but would be bound to pay it to his children.

The argument is plausible, but not sound. In the first place, if it was a fraudulent conveyance the children were parties to that fraud, and could have no better standing, at law or in equity, to recover back that money, than their father had. *Ergo*, the defendant may retain the excess of the judgment, and the sheriff might have retained the surplus money which arose on the sale. The statement of this result is a sufficient refutation of the argument.

Suppose a judgment clearly shown to have been obtained by fraud, or admitted to have been given by mistake, for twice as much as it ought to have been, would a court of equity refuse relief to the defendant, because he was a bad man and had conveyed away his property to defeat his creditors? Would the court say to him, you are a bad and dishonest man, and therefore we won't help you; we won't relieve you against a plain mistake, or even a judgment obtained against you by the grossest fraud? I think not.

When a man comes into court to get hold of property which, by his own fraud or injustice, has got into the hands of his adversary, or his title to which is founded in fraud or injustice, a court of equity will not hear him. It is sufficient to say this is not such a case. The maxim cited by counsel does not apply to it—a court of equity will not inquire into a man's character before it will relieve him against fraud, accident or mistake, unless by his own dishonest or unjust conduct he got himself into the difficulty he wants the court to get him out of.

But again. Whether that conveyance from Johnson to his children was a fraudulent one or not, is not a material issue in this cause. The plaintiff in the judgment got his money, and

---

Williamson v. Adm'rs of Johnson.

---

whether the conveyance was fraudulent or not, is of no consequence to him.

Again. Whether fraudulent or not, Johnson was bound by his covenants to his children, and was responsible over to them. He conveyed the premises, whether with or without consideration, to his children, *legally subject* to that judgment, and therefore was legally liable over to them. Admitting, therefore, that they, as owners of the land which had been sold to satisfy the judgment, might, in the lifetime of their father, have come into equity to get back the excess; they cannot do it now, for they have recognized their father's right to the money by making themselves complainants in this suit, and have thereby estopped themselves from ever claiming the money in their own right. I am, for all these reasons, of opinion that there is nothing in this objection.

2. It is objected that the order to amend was on payment of costs and serving a copy of the amended bill gratis; that this was a condition precedent, and was never performed, so that, in fact, the defendant considered the suit as at an end, and that his counsel told him, when the Chancellor pronounced his opinion sustaining the plea and demurrer, that there was an end of the suit, and he might go home, and would never hear any more of it.

As to what his counsel may have told him, it can have no influence here. He and his solicitor and counsel were in court when the decree was pronounced; and the order for leave to amend was embodied in the very decretal order sustaining the plea and demurrer. They had notice, then, that the suit was not at an end, for the decree does not dismiss the bill out of court, but, on the contrary, in its very terms, retains it in court, with leave to the complainant to amend it. It was the duty, then, of the defendant to attend to it, and follow it up, and if the complainant did not pay the costs, amend his bill and serve a copy within a reasonable time; he should have applied to the Chancellor for a final decree dismissing the bill with costs.

As to the non-performance of the condition precedent, paying costs, &c., it was a mere irregularity, of which the party should have availed himself at the time, but he actually waived it by subsequently applying for leave to answer, and by putting in



an answer to the amended bill. Instead of doing that, he ought to have moved the Chancellor to dismiss the amended bill, on the ground that no costs had been paid and no copy served. As to the defendant's having no knowledge of the suit being still in court and of the bill having been amended, it is untrue, unless Mr. Saxton has sworn grossly and willfully false. But how can the defendant make such an assertion, when, by his own affidavit, he has admitted, and, in fact, expressly stated, that before Mr. Stockton's death he received notice to appoint another solicitor? That he afterwards as expressly denied it in his answer cannot relieve him, but serves only to weaken our confidence in other matters sworn to by him in his answer.

3. The third objection is, that the suit had abated by the death of Johnson, and the order made by Chancellor Vroom that it stand revived in the names of the present complainants was a nullity. Coupled with this exception, it was insisted that the deposition of Mr. Saxton, made after that order of revival, and before the subsequent one made by Chancellor Seely, must be ruled out, as extra-judicial, or *coram non jūdice*, there being no suit then depending in court.

If I am not mistaken, the deposition of Peter Williamson, if not of others on the part of the complainants, stands in the same category, and was taken under the same circumstances. But, however that may be, it is a full and complete answer to the whole of this matter, that it is too late for the defendant to complain of it. In the first place, instead of applying to the Chancellor to open the decree and be permitted to answer, and to cross-examine the witnesses, he ought to have moved the Chancellor to open the decree, and to declare the suit abated by the death of the complainant; or to set aside all the proceedings which had taken place after the death of the complainant and before the revival of the suit by the order of Chancellor Seely, as *coram non jūdice* and void. Secondly, the defendant must be considered as having waived this irregularity by putting in an answer to the bill, taking testimony in the cause, and cross-examining witnesses that had been sworn and examined on the part of the complainant. And thirdly, if he wanted to get rid of the deposition of Mr. Saxton, the defendant ought to have moved the Chancellor, before the cause was heard

---

Williamson v. Adm'rs of Johnson.

---

upon the pleadings and proofs, to expunge that evidence as unduly and irregularly taken. If that had been done, the complainant might have re-examined Mr. Saxton before the hearing, and removed the difficulty. But, surely, the Chancellor did not intend, by giving the defendant leave to cross-examine the witnesses that had already been examined, to give him an opportunity of making his election among those witnesses, and then on the hearing of the cause to exclude the deposition of Mr. Saxton or of any other witness, sworn under like circumstances, that he chose not to re-examine. This would, in effect, have been to permit the defendant to play a trick on the complainant, and practice a fraud on the court.

It is said, however, by counsel, that Mr. Saxton's affidavit was a mere voluntary one, upon which no perjury could be assigned. But I am not so clear that the proposition is true. A cause was pending in court, *under the decretal order* of the Chancellor; and however irregularly so, the witness was sworn in that cause.

I am of opinion that the decree appealed from should be affirmed.

NEVIUS, WHITEHEAD, RANDOLPH and CARPENTER, Justices, and PORTER, SCHENCK, SPEER, ROBERTSON and SPENCER, Judges, concurred with the Chief Justice.

The PRESIDENT dissented. And, having prepared no written opinion at the time of the decision of the cause, has furnished the reporter with the following statement of the grounds of his dissent.

1st. The executor, in conveying to his son, in August, 1792, was guilty of a fraud. The attempted sale and conveyance have been decreed to be fraudulent and void; and the case stands as if no such conveyance had ever been made. The money, then, which it is alleged William Williamson received from Samuel Williamson, was not a part of the proceeds of a sale of the real estate, but Samuel Williamson's (he was the executor) own money. All that can be said is, that William Williamson received from Samuel Williamson money for which Samuel Williamson in his own right, not as executor, might

---

Williamson v. Adm'rs of Johnson.

---

have maintained *assumpsit*. But his remedy was lost by lapse of time. Samuel Williamson cannot be relieved from this position unless a benefit can be permitted to result to him as executor from his fraudulent act as an individual. This cannot be permitted.

And, in point of fact, the money, if any was paid to William Williamson, was not money of the estate, but Samuel Williamson's own money, for the deed to his son was not then made, and was not made until four months thereafter. It is probable that Samuel Williamson did not feel safe in his contemplated fraud in executing a deed to his son, unless he could first induce William Williamson to receive, as on a sale represented to be consummated, his share of the consideration money of the pretended sale, in full of his share of the estate. I cannot consent, in aid of a fraud-doer, to construe such an advance of money by Samuel Williamson to be an advance of money by him as executor.

I think it more consistent with every consideration of policy, and with the firmness with which courts of equity set their faces against fraud, more especially against fraud in executors, that Samuel Williamson shall suffer the loss of the money which, in 1792, he risked in such a venture, than that William Williamson's estate or Asher Williamson should now be obliged to pay \$2256, with interest thereon from October, 1843.

Twenty years elapsed from the time when the \$350 is said to have been received by William Williamson from Samuel Williamson to the time when the lands of the estate were sold under the direction of a master, the Court of Chancery having so ordered in view of the fraud which had been committed or attempted by Samuel Williamson; and the proceeds of the sale were deposited in the Court of Chancery, by order of that court, and were afterwards ordered to be paid to the executor, on his giving bond, with surety, for the performance of the trust reposed in him by the will of his testator. The bond was given, with Benjamin Johnson, the present complainant, as surety, and the proceed of the sale, after certain deductions, were thereupon paid to the executor.

It seems clear to me that, neither in law nor in equity, can any allowance be made to the executor or to his surety, for



---

 Williamson v. Adm'rs of Johnson.
 

---

money which Samuel Williamson, twenty years before, had fraudulently and of his own money put into the hands of William Williamson.

2d. The decree in this case has been reached by allowing the executor, or Johnson as his surety, interest on the \$350 fraudulently given by Samuel Williamson, in April, 1792, to William Williamson as his full share of the estate. This, also, I think erroneous. It would be oppressive and ruinous, after a great lapse of years, to charge a man with interest on money which he received as his own, and was, therefore, at liberty to spend as his own; and there is no principle on which such charge can be sustained. If my first objection to the decree could be overcome, the most that equity could require would be that what William Williamson received from Samuel Williamson should be deducted from the amount of the share which, after the fraud was exposed and remedied, was found to be actually due from the executor to William Williamson. Samuel Williamson was in possession of the lands from March, 1789, to March, 1812. All that can be required is that the \$350 shall relieve the executor from the rents and profits, as far as it will go. William Williamson never agreed to receive this money in a way to charge him with interest for it, and under the circumstances of this case, no implied agreement by him to pay interest for it can be raised.

On the 2d April, 1792, William Williamson received from Samuel Williamson ..... \$350 66

Samuel had then been in possession of the lands three years and twenty days. William Williamson's fifth of the rents and profits for that time, at the annual rent fixed by master Linn, is..... 68 75

---

Samuel's actual advance was only ..... \$281 91

At September, 1804, William Williamson's fifth of the rents and profits had repaid Samuel this \$281.91.

William Williamson's share of the rents and profits, from September, 1804, to March 11th, 1812, when the executor delivered up possession, seven years and six months, is \$168.75.

## Williamson v. Adm'rs of Johnson.

The lands were sold, under the direction of a master, for.....\$7,923 31

Deduct the allowance made for improvements .....\$505 00

Also the legacies, and the interest on them for twenty years, (which interest, if chargeable upon the lands at all, was a loss inflicted on those interested in the lands by the fraudulent conduct of the executor) ..... 1,280 00

Also the account of master Lian, for superintending the sale, \$173.80; also said master's commissions on the money paid into court, \$69.24; (both which last items of expense grew out of the fraud of the executor,) 243 04

Deduct also the costs of the complainants in the suit in which the sale by the executor was decreed to be fraudulent, (which costs also grew out of the fraudulent conduct of the executor, and ought properly to be charged upon him, and not upon the fund,) 202 23—2,230 27

Net proceeds of the sales, after all deductions.....\$5,693 04

William Williamson's fifth of this balance is.....\$1,138 61

Interest on \$1138.61, from March 11th, 1812, to February 27th, 1822, the date of the judgment against Johnson, 9 years, 11½ months ..... 793 67

Wm. Williamson's share of the rents, &c., as above, 168 75

Due the William Williamson share, at the time the judgment was entered.....\$2,101 03

The judgment was for \$2251.78, only \$150 more than the result of the above calculation. If we should strike out the allowance made in the above calculation for interest on the legacies, and the expenses of the sale under the direction of a master, and the costs of the suit in which the fraudulent sale by the executor was set aside—all which are, by reason of the fraud of the executor, more properly chargeable upon him than upon the fund—the amount due William Williamson at the time of the judgment, will be found to be nearly \$100 more than the

---

Williamson v. Adm'rs of Johnson.

---

amount for which judgment was entered. It is certainly true that all these extraordinary charges upon the fund have been induced by the fraudulent conduct of the executor; and the loss which William Williamson, or those who are entitled to his share sustain thereby, is greater than the loss which the executor or his estate would sustain by being obliged to pay the amount of the judgment recovered against his surety.

Nothing is denied to the executor in the foregoing calculation but interest on \$281.91, from April, 1792, to September, 1804; a very trifling injury, for he was receiving \$22.50 of the \$281.91 each successive year, in William Williamson's share of the rents and profits; and interest is properly denied to him; he cannot, on any principle, be allowed interest on money which he fraudulently induced William Williamson to receive as his share of the estate, when his share was many times greater. Is the executor to be permitted to charge the estate with all the expenses, and the interest on the legacies, and the costs consequent upon his fraud and the delay induced thereby in settling the estate, and yet ask interest on the sum which he advanced for the purpose of effecting his fraudulent design? a small sum, indeed, when advanced, but which, with interest from 1792 to the time of the decree in chancery, compounded as in master Reading's report, amounted to more than the whole amount of the judgment recovered for the share of William Williamson.

The oppressive result of an affirmance of this decree, on the one hand, and the very slight injury, if any injury at all, that can be complained of on the other side, if matters are left to stand as they were placed by the judgment, are considerations which constrain me to refuse my assent to an affirmance.

I cannot imagine that any member of the court could consider the executor himself entitled to any relief. The consideration that the complainant was a surety for the executor, has, I have no doubt, influenced the mind of the court. But, if the principal has no legal or equitable defence or right, by reason of a fraud committed or attempted, prior to the time when the bond with surety was given, can the surety have any such defence or right? If the principal was not entitled to interest on the money fraudulently advanced by him, long before the bond with surety was given, can the surety be entitled to have such in-



---

Williamson v. Adm'rs of Johnson.

---

terest allowed in his favor? I think not. An executor's giving security after a past fraud cannot cure that fraud in favor either of the principal or of the surety. And surely the conduct of this surety has not been such as to induce us to resort to constrained reasonings, or to compound with sophisms, in his favor. This leads me,

3dly. To another objection against affirming the decree to which, as it seems to me, no satisfactory answer has been given. It is this. While the suit against Johnson was pending, and before judgment had been recovered therein, Johnson, without consideration, and for the purpose of defeating the object of the suit, conveyed all his real estate to his son and daughter. This divested him of all title to or interest in the lands, as much so as if he had received a full consideration therefor. He could not, by any proceeding on his part, recover back the land, or any part of it; nor, if a judgment was recovered against him for too much, in the suit which the conveyance was intended to defeat, and the creditor levy upon and sell the land, on the ground that the fraudulent conveyance of it did not put it beyond his reach, and the fraudulent grantees buy the land at the sheriff's sale and pay the judgment, can the fraudulent grantor have the aid of a court of equity to recover back the excess of the judgment over the true amount for which it should have been entered. To allow him to do this would be to allow him to recover a part of the proceeds of the sale of the land which he had fraudulently conveyed, and of all interest in which he had fraudulently divested himself, when he would not be allowed to recover back the land, or any part of it.

Johnson can derive no aid from the fact that his deed to his children contained a warranty against encumbrances. There was no encumbrance at the time the conveyance was made—the judgment had not then been recovered. Nor has he paid the judgment, unless a court of equity can be willing to say he has paid the judgment because he fraudulently conveyed away his property for the purpose of defeating a creditor of the end and object of his suit. I confess I am unable to yield to the course of reasoning which the Chief Justice has adopted in answer to this objection. And I am quite as unable to understand the precise meaning of the Chief Justice in saying that “He

---

Williamson v. Adm'rs of Johnson.

---

(Johnson) conveyed the premises to his children legally subject to the judgment, and was, therefore, legally liable over to them."

I do not see that this surety can reasonably ask a court of equity to depart from settled and most salutary principles to relieve him from the effects of his own fraud. The claim of the complainant, in the most liberal view in which it can be presented, may be stated thus : A surety for an executor, believing that the executor, who was dead, had in his lifetime paid and taken a receipt for a portion of a claim existing against him, but being unable to find the receipt, makes no defence to a suit against him, the surety, but, for the purpose of defeating the creditor, before judgment is entered, fraudulently conveys all his property to his children ; judgment is afterwards entered, and execution is issued thereon, and the sum recovered is raised by a sale of the lands conveyed to the children ; the receipt is afterwards found, and it thus appears that the judgment was for too much. Will a court of equity decree to the fraudulent grantor the amount of the receipt ? Suppose that after the fraudulent conveyance the receipt is discovered and the judgment is thereby prevented ; would a court of equity decree the reconveyance of the lands to the fraudulent grantor ? In my judgment, an affirmative answer to either of these questions cannot be reached by sound reasoning.

Again. The decree is against *Asher Williamson*, and the amount of it is ordered to be raised out of the goods and chattels, lands and tenements, of *Asher Williamson*. The judgment was recovered by him, and the amount thereof was received by him as the administrator, &c., of William Williamson.

There was an allegation in the first bill that *Asher Williamson*, before he obtained letters of administration of the personal estate of William Williamson the younger, deceased, purchased from the heirs of the said William, or some of them, their claim against the executor, Samuel. If it had been shown that *Asher* had purchased the rights of the heirs of William Williamson, the decree, if right in other respects, might have been against *Asher* personally ; but no proof of such purchase appeared, and the second bill contained no such allegation.

I think the decree should be reversed.

# COURT OF ERRORS AND APPEALS.

APRIL TERM, 1846.

---

[The term of JOSEPH PORTER, who, under the arrangement of the terms of the six appointed judges of this court made pursuant to the constitution, took his seat for one year, expired February 5th, 1846, and he was re-appointed for six years from that day.]

---

MEHETABEL ANTHONY, APPELLANT, v. ELIZABETH ANTHONY, RESPONDENT.

No appeal lies from the decree of the Ordinary or surrogate-general in the matter of the assignment of dower.

---

This was an appeal from the final sentence or decree of the Ordinary or surrogate-general, approving and confirming the report of commissioners assigning dower to Elizabeth Anthony, widow, &c.

*P. D. Vroom*, in pursuance of a rule heretofore taken to show cause, &c., now moved that the appeal be dismissed for want of jurisdiction in this court.

Mr. Vroom referred to the 9th section of the old constitution, and said that it had always been held that no appeal lay to the governor and council from the Court of Chancery, or from the Prerogative Court, until by an act of the legislature an appeal



Chetwood v. Brittan.

---

was given from the Court of Chancery, but that to this day no appeal from the Ordinary had ever been brought. He cited 4 *Griff. Law Reg.* 1178, 1179, 1185.

He adverted to the supplement passed February 24th, 1820, to the "act relative to dower," the 7th section of which supplement gives an appeal to this court from any sentence or decree of the surrogate-general made under the authority of the said supplement, and insisted that the said 7th section was unconstitutional.

He adverted to article 6th, section 1st, of the new constitution. The judicial power shall be vested in "a Court of Errors and Appeals in the last resort in all causes as heretofore," and admitted that this increases the difficulty and importance of the question.

The appeal was dismissed by the whole court, except the president, who, being Chancellor and surrogate-general, declined voting. See note.

NOTE.—Is there any reason why the legislature cannot give to the Ordinary or surrogate-general jurisdiction over a new subject matter, and give an appeal from his decrees in reference thereto?

CITED in *Harris v. Vanderveer*, 6 *C. E. Gr.* 438, 443, 444, 454.

---

WILLIAM CHETWOOD, APPELLANT, AND STEPHEN P. BRITTAN, RESPONDENT.

It is not competent to show by parol that at the time of executing a bond the obligee agreed that the obligor should not be personally liable, but that the obligee would look for payment to the mortgage given to secure the bond.

This case, and the decision of the Chancellor thereupon, is reported in 3 *Green's Ch. Rep.* 334.

*Wm. Halsted* opened the argument in this court for the appellant. In addition to the cases cited for the complainant in the court below, he cited 1 *Term Rep.* 701; 3 *Green's Chan.* 155; 15 *Vesey* 85, 90; 2 *Dall.* 70; *Coxe's Chan.* 402; 14

---

 Ex'rs of Olden v. White.
 

---

*Wend.* 63; 8 *Ibid.* 641; 9 *Cowen* 227; 2 *Halst. Rep.* 1, 13; *Phil. Evid.*, by *Cowen*, 1432; 4 *John. Chan.* 167; 9 *Wheat.* 495; 2 *Eden's Rep.* 110; 11 *Wend.* 536; 10 *Ibid.* 310, 313; 13 *Pick. Rep.* 69, 75; 1 *Greenl. Evid.* 370, and note; 4 *John. Chan.* 144.

At the close of the opening argument, the court, upon the suggestion of Judge A. Robertson, had a conference, and unanimously agreed that it was not necessary to hear the counsel for the respondent, but said they would hear Mr. Vroom, the associate counsel for the appellant.

*P. D. Vroom* then closed the argument for the appellant. He cited, further, 1 *Hill* 606; 7 *Cowen's Rep.* 409; 1 *Ves. & Beam* 375.

Decree below affirmed, *per tot. cur.*, all being present except Chancellor Halsted, who had been of counsel with the complainant below, and Justice Randolph, who was absent, from indisposition.

---

THE EXECUTORS OF SAMUEL S. OLDEN AND OTHERS, APPELLANTS, AND ANN P. WHITE AND OTHERS, RESPONDENTS.

The testator, by his will, gives to his aunt, Ann P. White, \$10,000, to be paid to her as soon as practicable after his decease, or, with interest from that time. He then gives several other money legacies. He then makes specific bequests of furniture and other articles of personal property. He then says that he wishes his bank stock to make a part of his dear aunt's legacy, as it will give her less trouble in collecting. The will then provides thus: "Item.—After all my just debts are paid, and the expenses of fulfilling this my last will and testament, I give and bequeath all the remainder of my property, both real and personal, to be equally divided among my four cousins (naming them.) Item.—I wish that the house I have lately purchased of C. M. Campbell, valued at \$4000, to be part of my dear aunt's legacy, and that, in the division of her portion, my Trenton bank be calculated at \$40 per share, and my Easton bank at \$30 per share." And, by a codicil to his said will, he gave to his aunt, Ann P. White, in fee simple, a lot of woodland (describing it), containing fifteen acres, and all the plate in his house, and some other articles of personal property; and also gave by the codicil, three other money legacies, one of \$200, one of \$50, and one of \$75—

*Held*, that the lands devised in the residuary clause of the will were not

---

Exr's of Olden v. White.

---

chargeable, in aid of the personal estate, with the payment of the legacies, but that the personal estate being insufficient to pay the legacies, they must abate.

This case is reported in 3 *Green's Chan.* 343. The cause was argued in this court by

*W. Halsted* and *P. D. Vroom*, for the appellants, and

*R. S. Field* and *W. L. Dayton*, for the respondents.

Cases cited by the appellants, in addition to the cases cited by the counsel for the defendants below—1 *P. Wms.* 294; 10 *Gill & John.* 143; 8 *Conn. Rep.* 1; *Story's Com. on Const. of U. S.*, § 207; 1 *Story's Eq.*, § 565; 1 *P. Wms.* 729; 8 *Cond. Eng. Ch. Rep.* 167; 1 *Ves., Sr.*, 111; *Toll. on Exec.* 301; 1 *Roper on Leg.* 149; 2 *Smith's Chan.* 283; 1 *King's Rep.* 273; 1 *Coxe's Chan.* 180; 2 *Ves., Sr.*, 52; *Seaton's Forms* 74; 1 *Dess.* 500, 513; *Pow. on Dev.* 667; 2 *Dickens* 507; 1 *Sch. & Lef.* 238.

Cases cited by the counsel for the respondents—2 *Vern.* 228; 1 *Ves., Sr.*, 499; 4 *Mad. Chan.* 102; 1 *Ves., Jr.*, 436, 444; *Prec. in Ch.* 430, 397; 2 *Dickens* 507; 1 *Roper on Leg.* 451, 643; 1 *Ves., Sr.*, 495; 4 *Vin. Ab.* 460, pl. 180; 3 *Atk.* 352; 4 *Russ.* 376; 3 *Cond. Eng. Ch. Rep.* 714; 11 *Ibid.* 227; 14 *Ibid.* 696, 708; 1 *Ibid.* 604; 3 *Binney* 525; 6 *Ibid.* 395; 3 *Ves., Jr.*, 738; 9 *Law Lib.* 108; 1 *Story's Eq.*, § 569; 2 *Ibid.* § 1144; *Jeremy's Eq.* 162, 539; *Ambl.* 128; 1 *P. Wms.* 403; 8 *Ves.* 397; 3 *Paige* 405; *Seaton's Forms* 75.

Chief Justice HORNBLOWER gave an opinion in favor of affirming the decree of the Chancellor.

Justice CARPENTER, and Judges PORTER and SPENCER concurred.

Justice NEVIUS gave an opinion in favor of reversing the decree of the Chancellor.

Justice WHITEHEAD, Judges ROBERTSON, SPEER, and SCHENCK, and the President, concurred with Judge NEVIUS.

Decree below reversed.

CITED in *Day v. Day's Ad.*, 4 C. E. Gr. 137.



# COURT OF ERRORS AND APPEALS.

JANUARY TERM, 1847.

---

[The official term of JOSEPH C. HORNBLOWER, Chief Justice, expired October 31st, 1846. HENRY W. GREEN, Esquire, succeeded him as Chief Justice.

JOSHUA BRICK had resigned previous to this term, and THOMAS SINNICKSON had been appointed in his place.]

---

JEREMIAH W. BLYDENBURGH AND OTHERS, APPELLANTS,  
AND HENRY COTHEAL AND DAVID COTHEAL, RESPONDENTS.

1. A, living in New York, sold to B, also living in New York, a tract of land in New Jersey, and took B's bond for the consideration money, with seven per cent. interest, and his mortgage on the lands conveyed, to secure the payment of the bond. The mortgage is not usurious.

2. The exchange of the papers in New Jersey at the proper record office will not make the mortgage usurious; they having been executed and acknowledged in New York, and a sufficient reason for not exchanging them there being shown.

---

This case is reported *ante p.* 17. It was argued in the court by

*Jer. W. Blydenburgh*, for the appellants, and by

*W. H. Leupp*, for the respondents.

The decree of the Chancellor was unanimously affirmed.

---

Ross v. Haines.

---

## SAMUEL ROSS, APPELLANT, AND ABRAHAM HAINES, RESPONDENT.

1. If a mortgagor, subsequently to the mortgage, sells and conveys a part of the mortgaged premises, an equity arises in favor of the purchaser to have the part which remains in the mortgagor first sold for or towards the payment of the mortgage.

2. But if the purchaser agrees with the mortgagor that the part he buys shall be subject to the mortgage, and that the amount due on the mortgage shall be a part of the consideration he is to pay, equity will not interpose to subject the part of the mortgaged premises remaining in the mortgagor to be first sold.

3. And a subsequent grantee of such purchaser from the mortgagor, with notice, has no better equity against the mortgagor.

---

This case is reported *ante p.* 186, under the title of Joseph Engle v. Abraham Haines and wife, Samuel Ross, and others. It was argued in this court by

*W. N. Jeffers*, for the appellant, and by

*J. C. Ten Eyck*, for the respondents.

The decree of the Chancellor was unanimously affirmed.

WILLIAM VAN HOOK, APPELLANT, v. THE SOMERVILLE  
MANUFACTURING COMPANY, LUTHER LOOMIS AND SAM-  
UEL P. LYMAN, RESPONDENTS.

[The reporter is indebted to Justice WHITEHEAD for the following syllabus and report of this case.]

1. On bond and mortgage by corporation, bill to foreclose and decree *pro confesso* against the corporation and some of the defendants; an answer by the other defendants admitting the execution in the manner set forth in the bill of complaint, precludes all inquiry into the fact and manner of execution.

2. The company executed a bond and mortgage to S., its financial agent, for \$9600, for the purpose (as alleged in the answer) of raising funds by the sale of these securities for the use of the company. S. sold and assigned them to the complainant and appropriated the proceeds of the sale to his own use. *Held*, that, admitting the fraud charged, the company was still liable for the payment of the bond and mortgage in the hands of *bona fide* purchasers without notice of the fraud. The company having held out S. as the owner of the bond and mortgage, must, in such case, abide the consequences of the fraudulent conduct of its own agent.

3. Upon an examination of the testimony of this case—*held*, (contrary upon this point to the view taken by the Chancellor,) that there was no satisfactory evidence of any knowledge by the complainant of the alleged fraud of the agent; that the complainant stood in the position of a *bona fide* purchaser and assignee of the bond and mortgage, and held a valid and subsisting lien on the mortgaged premises.

4. The defendants, Loomis and Lyman, took a conveyance from the corporation, of the mortgaged premises, absolute on its face, but subject to a separate agreement signed by them and others, that they would hold said premises for the benefit of themselves and such of the parties to said agreement as should pay, *pro rata*, for the purchase, according to their respective interests. No trust appearing on the face of the conveyance to Loomis and Lyman, and it not appearing in any way that the others had contributed to the purchase and thereby become interested—*held*, that the latter need not be made parties to the suit.

---

The appellant, on the 30th June, 1843, filed his bill in the court below, to foreclose a bond and mortgage given by the said company to Jared N. Stebbins, dated 10th January, 1842, to secure the payment of \$9600 on the 5th January, 1845, with interest annually. The bill sets forth the execution of the bond and mortgage, the acknowledgment and registry of the latter,



---

Van Hook v. Somerville Manuf. Co.

---

and an assignment by Stebbins to the complainant, on the 25th day of July, 1842, and that no part of the principal or interest had been paid. The bill states a judgment recovered October 4th, 1842, in Somerset Circuit Court, by Joshua Doughty against the company, for \$2352 of debt, besides costs; also by the State Bank at Elizabeth, in the same court, for \$1352.52 debt, besides costs; which are claimed to be liens on the mortgaged premises. It also states that on the 16th October, 1842, the company conveyed the mortgaged premises to Loomis and Lyman, two of the defendants. That Henry Ibbotson, another defendant, on the 22d October, 1842, recovered a judgment in said Circuit Court against the company for \$1190, besides costs, also claimed to be a lien on said premises. That Ibbotson had filed his bill in chancery against the company and Loomis and Lyman to set aside the conveyance to the latter, and to enforce the payment of his judgment against the said mortgaged premises. The complainant, Van Hook, insists upon his preference, and the bill then prays that the company may be decreed to pay the amount due upon the mortgage, and that in default thereof, the mortgaged premises be sold for that purpose, &c.

A decree *pro confesso* was taken in October, 1843, against the company, Doughty, the Bank at Elizabeth and Ibbotson.

Loomis and Lyman filed their answer to the bill. They admitted the execution of the bond and mortgage to Stebbins, but denied their validity. They denied any indebtedness of the company to Stebbins, and proceeded in their answer to set out the circumstances under which, as they alleged, these instruments were executed. That they were executed in order to enable Stebbins to raise money by sale of these securities, and thereby evade the law restraining the rate of interest. The answer sets out the indebtedness of the company, and the necessities which constrained it to resort to this mode of raising money. That a false certificate was given by the president of the company to Stebbins, for the purpose of enabling the latter to deceive persons into the belief that the amount for which the securities purported to have been given was really due, contrary, as the answer alleged, to the fact. That Stebbins failed to make any contract for the loan of money; but afterwards, and about the 11th July, 1842, agreed to transfer the bond and

---

Van Hook v. Somerville Manuf. Co.

---

mortgage on his own account, to the complainant, in exchange for certain lots of leasehold property in the city of New York, which agreement, they averred, was without authority and without consideration, fraudulent, and intended to injure the defendants.

The answer further states that, on the 25th July, 1842, Stebbins fraudulently assigned the said bond and mortgage, in pursuance of said fraudulent agreement, and, on the 1st August, 1842, procured the assignment to be recorded in the clerk's office of Somerset, as a cover to the said fraud, but that, as the defendants were informed and believed, the bond and mortgage were not delivered to the complainant until the 29th September, 1842. That a conveyance was made to a son of Stebbins, by the complainant, in pursuance of said fraudulent agreement, of the lots proposed to be given in exchange for the bond and mortgage, by an instrument in writing, dated 11th July, 1842, and recorded in New York, for the nominal consideration of \$10,000, and that the said conveyance to the son was to cover the fraud of Stebbins and the complainant. That all this was done with full knowledge and notice, by the complainant, of the circumstances attending the execution of the bond and mortgage, and of the purposes with which done. The answer further alleges that the complainant employed an agent to procure the *post facto* passage of resolutions by the managers of the company, for the purpose of covering the said fraud, and charges that the transaction is fraudulent and void.

The answer proceeds to set out, at length, the interest of the defendants Loomis and Lyman, in the mortgaged premises, and, to assert the validity of the conveyance to them, of the same, by the company, denies all unlawful combination, and prays that the bill may be dismissed.

The complainant filed the usual replication, and the cause was thus put at issue.

The testimony, which was voluminous, is stated at large, in the report of the case below, and it is unnecessary to be here repeated. The exhibits set out in the answer, or shown in evidence below, also appear in the same report. See 1 *Halsted's Chan. Rep.* 137-186. The Chancellor sustained the defence, and dismissed the bill.

---

Van Hook v. Somerville Manuf. Co.

---

The cause was argued on the appeal, by *P. D. Vroom* and *A. Whitehead*, for the appellant, and by

*B. Williamson* and *S. P. Lyman* (of New York), for the respondents.

The opinion of the court was delivered by WHITEHEAD, J.

The first question for the consideration of the court, is whether the mortgage set forth in the bill of complaint, is the deed of the company. So far as regards these parties, and under the pleadings in the cause, this cannot be an open question. The answer of the defendants distinctly admits that the company executed the bond and mortgage in the manner set forth in the bill of complaint. This admission precludes all inquiry into the fact or the manner of the execution. It was not a matter in issue in the cause, and the defendants were not at liberty to controvert it. If this be the law of the case, then it is entirely unnecessary and irrelevant to inquire whether the several meetings of the managers were regular and in pursuance of their charter, or whether any of the managers who took part in the proceedings of the meetings were competent to act.

Assuming, then, that the bond and mortgage were regularly executed, the next question raised by the counsel, is whether they were given for a valuable consideration. But, upon this question, it is not necessary for the court to express an opinion. Admitting that there was no consideration, and that they were given for the purposes alleged by these defendants, how does the case then stand upon the evidence? Stebbins, the mortgagee, was, and had been, for two years or more previous to the 5th day of January, 1842, when it was resolved by the board to give the mortgage, the acknowledged financial agent of the company, at a salary of \$3000. Under these circumstances, it is fair to presume that he had the entire confidence of the managers and stockholders. The company were, at this time, in need of money to discharge claims pressing for payment, and to put the works in operation. He was authorized by the board, as its agent, to negotiate the mortgage. It was placed in his hands for the purpose. The board of managers held him out to the world as the *bona fide* holder of it, with all the presumptions



---

Van Hook v. Somerville Manuf. Co.

---

the law would raise, from the possession of it by him, that it was given for a valuable consideration. If, under these circumstances, and clothed with this authority, he negotiated the mortgage as his own property, given for a valuable consideration, he did no more than he was authorized to do by the managers. He was simply carrying out their intentions, as expressed in their recorded resolutions, copies of which were furnished him for the purpose. In this view of the case, even if he did commit a fraud upon the company, as is insisted by the defendants, the company is nevertheless bound for the payment of it, unless the complainant took the assignment with notice of the fraud. The company must abide the consequences of the fraudulent conduct of its own agent.

It is said, however, that Mr. Van Hook had notice of the fraud by Stebbins, and that, therefore, the mortgage is void in his hands. No satisfactory evidence is to be found in the case of a combination between Stebbins and Van Hook, or that the latter regarded the mortgage otherwise than as a fair and *bona fide* transaction between the company and Stebbins. The conduct of the complainant relied upon as evidence of fraud, or as evidence of his knowledge of the fraudulent intentions of Stebbins, is his employment of counsel to look into the circumstances under which the mortgage was given; and the conduct of the counsel in asking an additional resolution to be passed by the board, that the bond and mortgage were a legal and subsisting liability of the company; and the further certificate of the president, Mr. Gaston, that the same were given by the order of the board of managers, and that the amount thereof was due Mr. Stebbins. Nothing is seen in all this furnishing the slightest evidence of fraud. It is but the prudent action of a careful man. Considering the amount of the mortgage, and the fact that the complainant resided out of the state, there was an apparent necessity that he should employ counsel in this state to examine the company's title to the mortgaged premises, and to ascertain whether the board had complied with all the requisitions of the law to constitute the mortgage a valid security. The charge of fraud might much more properly have been made against the complainant, had he purchased the mortgage for this large amount without any examination by counsel. Nor

---

Van Hook v. Somerville Manuf. Co.

---

can fraud be inferred from the action of the complainant's counsel in the premises. They did no more than any prudent, faithful counsel would have done under like circumstances.

The testimony of Mr. Gaston, detailing what took place in his interview with the complainant at Somerville, is relied upon as evidence of notice on the part of the complainant of the object for which the mortgage was given. In relation to this testimony, it should be remarked that the object of Mr. Van Hook's visit to Somerville was not to examine the title to the mortgaged premises, nor the circumstances under which the mortgage was given, but simply to satisfy himself of the value of the premises. This is proved by the other testimony in the cause, and Mr. Gaston himself says that *he* (Mr. Van Hook) *came out to look at the property*. He says further, *that Mr. Van Hook made several inquiries respecting the value of the premises*. This was the whole object of his visit, and was necessarily the principal subject of conversation. All the other matters connected with the affairs of the company, about which Mr. Gaston says they conversed, were matters in which Mr. Van Hook had but little interest. It would be dangerous to fix a party with notice of fraud by a casual conversation upon matters in which the party sought to be charged had but little or no interest.

Again. It is said (in the defendant's own language) that no decree favorable to the complainant can be made until all the persons interested are made parties to the suit. The persons referred to are the parties of the second part to the memorandum of an agreement dated in October, 1842. The allegation is, that they are interested under and in pursuance of that agreement, and should have been made parties with these defendants. The question presented is, does the simple execution of the agreement by these parties, without any other or further act done by them, give them such an interest as to make it necessary to bring them into court as defendants? By the terms of the agreement it was contemplated that something further was to be done by the parties, in the event of a purchase by Loomis and Lyman, before they could be interested in the purchase. They might, or they might not become interested. They had the option to protect their respective equitable interest by

---

Garr v. Hill.

---

making *pro ratâ* advances. If they refused or neglected to make these advances, they certainly had no interest in the purchase afterwards made. The agreement in that case, as to them, was a dead letter. But if they did avail themselves of the option made them by the defendants, (Loomis and Lyman,) so as to entitle themselves to share in the benefits contemplated by the purchase, then the *fact* that they did contribute and thereby became interested, ought to appear either in the answer or in the proofs. Now this fact nowhere appears in the cause. In the absence of any allegation or proof of the kind, they cannot be regarded as parties in interest. The simple fact that they signed the agreement referred to, does not of itself invest them with such an interest as required the complainant to bring them before the court as parties defendants.

Again. The deed from the company to these defendants is absolute upon its face. There is nothing showing a trust.

We are of opinion that the mortgage is not fraudulent, but a valid lien and encumbrance upon the premises therein mentioned and described; and that the complainant is entitled to the relief sought and prayed for by him in his bill of complaint.

---

ANDREW S. GARR, APPELLANT, AND SELAH HILL, RESPONDENT.

On bill filed, the complainant had obtained an injunction restraining the defendant from aliening or encumbering certain real estate which was in controversy between the complainant and defendant, and from collecting or receiving the rents; and had also obtained an order appointing a receiver of the rents and profits. Afterwards, by an order dated February 13th, 1844, the Chancellor made an order authorizing the receiver, instead of collecting the rents himself, to permit the defendant to do it for him, until the further order of the court, upon the defendant's giving bond, with satisfactory security, for the payment to the receiver of the rents received by him. *Held*, that such order could not be appealed from.

---

The case sufficiently appears in the opinion of the court, which was delivered by Chief Justice GREEN.



---

Garr v. Hill.

---

The court are unanimously of opinion that no appeal will lie from the order complained of in this case.

The subject matter of controversy in the cause was the right to certain real estate in Jersey City. The appellant, who was complainant in the original bill, had obtained an injunction restraining the defendant from aliening or encumbering the property, and from collecting or receiving the rents. An order had also been made at the instance of the appellant, appointing a receiver of the rents and profits.

By an order bearing date on the 13th of February, 1845, the Chancellor authorized the receiver, instead of collecting the rents in person, to permit the defendant to perform that duty for him, until the further order of the court, upon the defendant's giving bond, with satisfactory security, for the payment to the receiver of the rents received by him, under the authority of the court. This is the order complained of.

Without attempting to define with precision the line which marks the boundary between appealable and non-appealable orders, the court deem it perfectly clear that this is an order from which no appeal can be taken. The party cannot, *in a legal sense*, be aggrieved by it. It does not touch the merits of the question. It does not affect the rights or interests of the party. It leaves the subject matter of the controversy precisely where it stood before. It is simply an order regulating the conduct of an officer of the court. It permits the receiver to collect the rents by proxy—not in person. It retains the fund under the control and subject to the order of the court, precisely as it was before. It does not, as was suggested by the counsel of the appellant, modify, much less dissolve, the injunction. It does indeed permit the defendant to collect the rents; not, however, for himself, but as the agent of the receiver, and for the benefit of the fund, under the control of the court.

The order might have been made at the instance of the receiver, without notice to either of the parties. It is, moreover, an order which, at any time, upon the application of either party, may be rescinded or modified by the Chancellor. If the security taken by the receiver be insufficient, it is competent for either party to apply for further directions upon that point.

A refusal by the Chancellor to appoint a receiver, or the re-

---

Garr v. Hill.

---

moval of a receiver when appointed, is not the subject matter of appeal. In *Rogers v. Hosack's Ex'rs*, 18 *Wend.* 329, the Court of Errors of New York held that no appeal would lie from an order of the Chancellor refusing to remove an executor and to appoint a receiver in his stead. In that case, Justice Cowen said, "I understand the line of authorities to stand almost without exception, that to warrant a reversal upon appeal from chancery, some definite rule of law or equity must appear to have been violated." The appeal must be dismissed with costs.

The court deem it their duty thus to dispose of the cause, from a regard to the maintenance of the proper practice of the court, although the motion to dismiss the appeal was not pressed on the part of the respondent. Inasmuch, however, as the merits of the case were fully discussed by counsel upon the argument, and as it may be more satisfactory to the parties, the court authorize me to add, as their unanimous opinion, that the order of the Chancellor was right, and had the appeal been regular, the order should be affirmed.

CITED in *Woodruff v. Chapin*, 3 *Zab.* 559; *State v. Wood*, *Id.* 560; *Owen v. Arvis*, 2 *Dutch.* 43; *Attorney General v. City of Paterson*, 1 *Stock.* 629; *Matter of Anderson*, 2 *C. E. Gr.* 538; *National Bank of Metropolis v. Sprague*, 6 *C. E. Gr.* 460; *C. & A. R. R. Co. v. Stewart*, 6 *C. E. Gr.* 486.

# COURT OF ERRORS AND APPEALS.

APRIL TERM, 1847.

---

[The term of FERDINAND S. SCHENCK expired February 5th, 1847, and he was re-appointed for six years from that day.]

---

VANROOM ROBBINS, APPELLANT, AND JOHN L. McKNIGHT,  
RESPONDENT.

A and B entered into an agreement that A should furnish 2700 peach trees, at his expense, and that B should plant and cultivate them on his farm, at his expense, and should pick and market the fruit during the life of the trees, at the joint expense of the parties, and account to A for half the net proceeds of the sales. The trees were furnished and planted and cultivated accordingly. A died, and the administrator of his estate sold his interest to D Heid, that the Court of Chancery, on bill filed by D, might decree the performance of the agreement and an account and the payment to D of half the net proceeds of the sales.

---

This case is reported *ante p.* 229. It was argued on the appeal by

*W. N. Jeffers* and *A. Browning*, for the appellant, and by

*S. G. Polts* and *P. D. Vroom*, for the respondent.

The opinion of the court was delivered by Chief Justice GREEN.



---

Robbins v. McKnight.

---

CHIEF JUSTICE. It is objected in the first place, that the terms of the contract, as set forth in the bill, or as established by the proofs, are not in themselves sufficiently certain to entitle the complainant to a specific performance.

It is an admitted principle of equity that all the terms of a contract must be clear and definitely ascertained, so as to enable the court to arrive at a satisfactory result as to the entire contract, or a specific performance will not be decreed. *Story's Eq. Pl.* 767.

The only exception which has been taken to the terms of the contract, as stated in the complainant's bill, is that it does not appear by whom, or under whose direction, the fruit is to be picked and marketed. In every other respect, it is not denied that the terms of the contract as set forth are sufficiently clear and specific.

However serious an objection this might have been to a specific execution of the contract as set out in the bill of complaint, the whole difficulty is removed by the express admission of the defendant's answer. The answer states that by the agreement the peaches were to be picked and marketed by the defendant; and the decree of the Chancellor is made in strict accordance with this admission. It surely does not lie in the mouth of the appellant to insist that the contract lacks precision in a particular which is distinctly stated and admitted by him in his answer under oath.

2d. It is objected that the contract, as sought to be enforced, is not established with sufficient certainty by the evidence.

Now the fact of the making of the contract. That by the terms of the agreement, 2700 trees were to be furnished by Jaques and delivered at Camden, at his expense; that they were to be cultivated by Robbins on his farm; that they were to be picked and marketed by him at the joint expense of both parties; and that the net proceeds were to be equally divided between them, are all distinctly admitted by the defendant's answer. Upon these points no further proof was requisite. They are established by evidence which is conclusive against the appellant. *Gresley's Eq. Ev.* 10, 165; 1 *Smith's Chan. Pr.* 273; 4 *Mad. R.* 15, *E. In. Co. v. Keighley*.

The only points to be settled by the evidence were:

---

Robbins v. McKnight.

---

1. At whose expense were the trees to be carted from Camden and cultivated ?

2. Was the balance due on a promissory note for one hundred and seventy dollars and thirty-five cents, bearing date the 5th of April, 1841, given by Richard and Samuel R. Jaques to the appellant, to be deducted from Jaques' share of the net profits ?

The terms of the contract, as set out by the complainant's bill, are substantially proved by Samuel R. Jaques, who was present when the contract was made; by Ballanger, who heard them from the lips of Jaques, in the presence and hearing of Robbins; and by Knowles, who details them as they were stated by Robbins, after the death of Jaques. There is evidence standing unimpeached amply sufficient to overcome the answer of the defendant, (even if unexceptionable,) and the corroborative testimony of Pierson, the only witness by whom either of its material allegations seem to be supported. In addition to this, we have the conclusive fact that the note, the payment of which is alleged by the answer to have been one of the terms of the contract between Robbins and Jaques, bears date at least one year after the contract was executed.

3. It is objected that the contract is void, as being within the operation of the statute against frauds and perjuries.

To whatever weight this objection might have been entitled at law, it is clear that in a court of equity it has been exempted from the operation of the statute by part performance. In pursuance and part performance of the agreement, the trees have been purchased and delivered by Jaques, and received, planted and cultivated by Robbins. The grounds of objection to the enforcement of a parol agreement are removed. Neither party can be restored to the position in which he stood before the making of the contract; and equity requires that the agreement should be specifically carried into execution.

3. It is objected that the contract between Jaques and Robbins constituted a partnership; that the interest of a deceased partner in the partnership effects cannot be sold, and that the purchaser cannot interfere with the rights of the surviving partner.

Admitting the contract to have constituted a strict commer-

---

Robbins v. McKnight.

---

cial partnership, it would seem to be a sufficient answer to the objection to say, that although the legal title to the partnership effects, upon the death of one partner, vests in the survivor, the beneficial interest remains in his representative; that a valid assignment may be made of this beneficial interest, which will vest in the assignee a right in equity to an account and to a fulfillment of the trust by the surviving partner; that the decree, in this case, in no wise interferes with the legal rights of the survivor, but designs to enforce an account of the trust, which the defendant, by his answer, admits that he is bound to render.

But I am of opinion that this agreement, as between the parties themselves, constituted no partnership. A participation in the profits, does not, necessarily, and in all cases, constitute the recipient a legal, responsible holder. There is a large and familiar class of cases not within the general principle. *Per-rine v. Hankinson*, 6 *Halst.* 181; *Hesketh v. Blanchard*, 4 *East* 144; *Wilkinson v. Frazier*, 4 *Esp.* 182; *Muzzy v. Whitney*, 10 *John. Rep.* 228.

To constitute a partnership, as between the parties themselves, there must be a joint ownership of the partnership funds. *Chase v. Barrett*, 4 *Paige* 160; 3 *Kent's Com.* 24.

There was no such joint ownership, as between these parties. No new right was acquired by survivorship, upon the death of Jaques: no interest upon which the rights of survivorship could attach. The legal rights of Robbins were unaffected by the death of Jaques.

I regard the agreement as a special contract, under which Jaques is to be remunerated for the cost of the trees, by receiving a share of the profits. The contract, in its operation and legal effect, is simply a sale of the trees by Jaques to Robbins, in consideration of his receiving therefor, one-half of the proceeds of the sales of the fruit, deducting thereout the cost of picking and marketing the fruit.

It was said, upon the argument, that this was a contract respecting land, or an interest in land. I cannot so regard it. On the contrary, I think it clear that, immediately upon the trees being received and planted by Robbins, upon his land, the legal title to them vested exclusively in him. Jaques retained no



---

Robbins v. McKnight.

---

legal interest in the trees, much less acquired any in the soil upon which they were planted. They became a part of Robbins' freehold, and, in law, he stood seized of them as fully and exclusively as of any other part of his freehold. True, he was a trustee in equity, and bound, by virtue of his trust, to cultivate the trees in a careful and husbandlike manner, bound to preserve them from waste or destruction, and bound to account to Jaques, his legal representative or assignee, for his share of the net profits. This is the true limit and extent of Jaques' interest in the property. As *cestui que trust* of one-half of the profits, he was entitled to have the trees properly cultivated, and the fruit properly marketed. By giving this construction to the contract, I think we shall best effectuate the intention of the parties, and most effectually secure their respective rights.

5. This view of the case affords an answer to the fifth objection urged to the decree, viz., that at the time of the bill filed, the complainant was not entitled to the relief afforded by the decree.

At the time of filing the bill, the existence of the trust had been denied by the appellant; the complainant sought to have the trust established. The trustee claimed an exclusive control over the trust property, and a right to deal with it to the prejudice of the interests of the *cestui que trust*. The bill sought to restrain the exercise of that power so far as to prevent waste and to protect the interests of the *cestui que trust*. These were unquestionably, proper objects of relief in equity, and the court, having once obtained jurisdiction of a cause for one purpose, will retain it for the more important purposes of the suit. And this, although they be distinct and independent grounds of relief from those originally contained in the bill, and although it becomes necessary to file a supplemental bill to bring the case fully before the court. But here, there was no new and substantial ground of relief—nothing requiring the aid of a supplemental bill. The court was fully in possession of the cause for the purpose of establishing the trust and the protection of the trust property. During the pendency of the suit, the trustee becomes possessed of trust funds, and the court compel him to account for the funds so received, pursuant to the prayer of the bill as amended by leave of the court. This, we apprehend, is in ac-

---

Robbins v. McKnight.

---

cordance no less with sound principle than with the ancient usage and established practice of the Court of Chancery.

The last objection to the decree appealed from is that it denies to the appellant the right to an allowance upon taking the account before the master, of the amount of Richard and Samuel R. Jaques' note of the 5th of April, 1841.

It is very clear that this claim cannot be allowed upon the ground assumed in the answer, viz., that it formed a part of the original contract. The evidence is clearly otherwise.

But it was insisted upon the argument with much earnestness and force of reasoning, that independent of any contract, the appellant was entitled upon accounting to the allowance of the amount of that note as an equitable set-off against the claim of the complainant. That inasmuch as it appeared by the evidence that Samuel R. Jaques had paid his share of the joint note, the balance remaining due became in equity the sole debt of Richard Jaques, and should be allowed against the claim of the complainant, the estate of Richard Jaques being insolvent.

As a general *principle* equity follows the law in the allowance of a set-off, and will not allow a set-off of debts accruing in different rights. Even in cases of bankruptcy it is not allowed, except under special circumstances.

In the case of *Hanson, ex parte*, 18 *Vesey* 232, which was cited on the argument in support of the claim of set-off, the joint debt was a mere security for the separate debt of the party claiming the set-off, and the Chancellor places the decision distinctly on that ground.

It is true that Lord Roslyn, in *Ex parte Quinten*, 3 *Vesey* 248, allowed the set-off in a case of bankruptcy, under circumstances which might be supposed to justify it in the present instance. But in *Ex parte Troogood*, 11 *Vesey* 416, Lord Eldon denied a similar application, which was based upon the authority of Lord Roslyn's decision, in *Ex parte Quinten*, denying the authority of that case. In *Addis v. Knight*, 2 *Mer.* 124, Sir William Grant, master of the rolls, decided in accordance with the views of Lord Eldon, adding, "It is quite clear that, as at law, a *joint* cannot be set off against a separate demand." The same rule prevails in equity, and must continue

---

Robbins v. McKnight.

---

to prevail so long as the present system in regard to joint and separate estates subsists.

In *Dale v. Cook*, 4 *John. Ch. R.* 15, Chancellor Kent, upon a review of the authorities, said, "My conclusion is that joint and separate debts cannot be set off in equity, any more than at law." And the current of American authorities seems fully to sustain this opinion. 2 *Story's Eq.*, § 1437, note 1.

To warrant the interference of a court of equity, there must be special circumstances creating an equity. Whether the mere insolvency of one of the parties creates such an equity, has given rise to some difference of opinion. Insolvency alone was considered as affording such equity in *Pond v. Smith*, 4 *Conn. Rep.* 297, and the same principle was adopted by the Court of Errors in New York, in *Simpson v. Hart*, 14 *J. R.* 63.

But Mr. Justice Story, in *Green v. Darling*, 5 *Mason* 145, and in *Howe v. Shepherd*, 2 *Sumner* 416, expresses his dissent from the principle adopted in Connecticut and New York, and in the latter case he declares that his researches have not enabled him to find in English jurisprudence a single decision which countenances any such equity for a set-off. In *Gordon v. Lewis*, 2 *Sumner* 633, the same learned judge re-asserted the doctrine that insolvency alone constitutes no ground for the interference of the court.

The appellant in the present case labors under the further embarrassment in support of this claim, that he is seeking the aid of a court of equity to establish an *equitable* set-off against a *bona fide* assignee of the individual debt, for a valuable consideration without notice; and that, too, without having made the claim a distinct ground of defence by his answer. If any doubt can be entertained as to the general principle involved in this point, these objections would be conclusive against the appellant's title to relief.

I am of opinion that the decree of the Chancellor should be affirmed, with costs, and that the record be remitted to the Court of Chancery, to be proceeded in agreeably to law.

*Per tot. cur.*

Decree affirmed.



# COURT OF ERRORS AND APPEALS.

OCTOBER TERM, 1847.

---

HENRY A. MOORE, EXECUTOR, &c., OF RESCARRICK MOORE,  
DECEASED, APPELLANT, AND JULIA SMITH, RESPONDENT.

1. Though there be no express evidence of the delivery of an ante-nuptial agreement, and though it was in the possession of the husband after the marriage, its delivery will be presumed if its due execution be proved and it appear that it was recognized by the husband.

2. If an executor receive the effects of his testator and does not apply them in due course of administration, his estate is liable, and his executor may be called upon in equity to pay the legacies in due course of administration of the assets which came to his hands.

---

This case is reported in 3 *Green's Ch. R.* 485.

*S. R. Hamilton* and *P. D. Vroom*, for the appellant. They cited 3 *Kent's Com.* 521, 524, 528, 529; 2 *Ibid.* 444; *Dickens* 563; 6 *Simons* 40; 5 *Ves.* 654; 7 *Ibid.* 558; 9 *Ibid.* 107; 2 *Swanst.* 288; 7 *John. Chan.* 269.

*W. Halsted*, for the respondent.

The decree of the Chancellor was unanimously affirmed.

---

Plume v. Small.

---

JOHN I. FLUME, APPELLANT, AND GEORGE D. SMALL, RESPONDENT.

1. The conditions of sale for the sale of lands and buildings provided for the sale of the buildings separately; and one of the conditions of the sale was as follows: "The buildings will be sold, to be removed within thirty days from this date, from the premises." *Held*, that the purchaser of a building who also purchased the lot on which it stood, was not bound to remove the building.

2. The Court of Chancery cannot act on a distinct ground for relief made by the proofs, if it be not set up in the bill.

This case is reported *ante p.* 460.

*A. Gifford* and *Wm. Halsted*, for the appellant.

*A. C. M. Pennington*, for the respondent.

The decree of the Chancellor was unanimously affirmed.

---

THE COMMERCIAL BANK OF NEW JERSEY, APPELLANT, AND JOSEPH W. RECKLESS AND WIFE, RESPONDENTS.

1. The possession by a mortgagee of a mortgage executed and recorded is, in itself, cogent evidence of delivery.

2. The answer of a mortgagor to a bill of foreclosure denying the delivery of the mortgage is not, in itself, sufficient to overcome the presumption of delivery arising from the possession of the mortgage by the mortgagee, duly executed, acknowledged and recorded.

3. The uncorroborated testimony of a single witness is not sufficient to overcome the denial of an answer.

4. An answer may contain within itself such circumstances as will alone suffice to deprive it of all efficacy. *Per* Chief Justice GREEN.

5. What evidence held sufficient of the delivery of a mortgage, though the bond to secure which the mortgage was given was in the possession of the obligor.

---

This case is reported *ante p.* 430. *C. Parker* and *P. D. Vroom*, for the appellant. *J. Vandyke* and *W. L. Dayton*, for the respondents.

Chief Justice GREEN delivered the following opinion :

The only question in this cause is, whether the mortgage was delivered. It is admitted by the answer that the debt was due ; that the mortgage was executed in pursuance of an agreement between the parties ; but the delivery is denied.

The possession by the mortgagee of the mortgage executed and recorded, is in itself cogent evidence of delivery. Is the answer alone sufficient to overcome that evidence ?

The rule in equity is well established, that the uncorroborated testimony of a single witness is not sufficient to overcome the denial of an answer, for the simple reason that it is but oath against oath. It requires that the testimony of the witness should be supported by additional evidence, direct or circumstantial. Circumstances alone, however, without the testimony of a single witness, may overthrow an answer. The answer itself may be so obviously contradictory, inconsistent, and incredible ; may contain within itself such circumstances as will alone suffice to deprive it of all efficacy and vitality. The rule obviously, *ex necessitate*, applies only to a fair and untainted answer—not to an answer in itself inconsistent, contradictory, incredible.

Admitting the answer in the present case to be fair and untainted, the question is presented, whether the answer of a defendant in equity to a bill of foreclosure, denying the delivery of the mortgage, is in itself sufficient to overcome the presumption of delivery arising from the possession of the mortgage by the mortgagee, duly executed, acknowledged, and recorded. Must the mortgagee, to overcome the answer, be fortified with proof of the fact of delivery, beyond that afforded by the mortgage itself ? I think not. It would render mortgage securities alarmingly insecure. Upon a bill of foreclosure, the complainant has no option whether to trust the answer of the mortgagor. He is compelled to make him a defendant, and to receive his answer. He may be utterly without character, legally infamous, or even attainted of perjury—the mortgagee must still appeal to his conscience. His answer must be taken, and that answer has the same efficacy, so far as mere character is concerned, as the answer of the most pure and irreproached charac-



---

Commercial Bank v. Reckless.

---

ter in society. I hold that the possession by a mortgagee of a mortgage duly executed and acknowledged, affords such cogent presumptive proof of delivery as cannot be overcome by the naked answer of the mortgagor.

I am of opinion, moreover, that this answer is not entitled to the weight of a fair and consistent answer, but is, in many material respects, seriously impeached.

1. The answer alleges that the defendant was induced by the urgent importunity of the complainants to execute the mortgage.

Two witnesses testify that the mortgage was taken at the instance of Mrs. R., to secure her husband from prosecution by the bank. It appears, moreover, that Reckless, at the time of the transaction, was confined to his house by indisposition. There is, upon the evidence, no pretence of any correspondence directly between the bank and the defendant, either verbally or in writing. The whole correspondence was through the wife and son of the defendant. The evidence utterly negatives this pretence of solicitation and importunity.

2. The answer alleges that the defendant was debilitated in mind by extreme illness, and was at the time confined to his room by sickness.

This is expressly negated by the defendant's own son and witness.

The answer avers that the bond was never out of the defendant's possession; and that immediately after signing the papers, induced thereto by the importunity of the complainants, he resolved to have nothing further to do with the matter; and if it does not expressly deny, it involves the implication strongly and clearly, that he did nothing further towards completing the transaction.

Now it appears unequivocally, by the papers and by the testimony of the defendant's son and agent, that, for three weeks after the execution of the bond and mortgage, measures were in progress to carry the arrangement into effect. The mortgage was executed and acknowledged on the 5th of March; the policy of insurance was issued on the 8th; its transfer authorized on the 15th; the mortgage was left at the clerk's office on the 24th; the certificate of the clerk was procured on the 25th of that month, and afterwards furnished to the bank.

---

Commercial Bank v. Reckless.

---

4. The answer avers that the son took the mortgage out of the defendant's possession at his request, in order to procure a certificate of search as to encumbrances. The son avers that the search was made not at his father's, but at Bruen's request, and denies that his father had any knowledge of it till weeks afterwards.

But I forbear to press this topic further. It is obvious that these are not mere discrepancies or inconsistencies in immaterial averments. They involve the whole fabric of the defence. Every material allegation and pretence of the answer is directly impeached by the evidence. It stands utterly unsupported.

If the doctrine *falsus in uno, falsus in omnibus*, can ever have application to an answer in equity, it seems to me it must be applied here. In my judgment, this answer is not entitled to the weight of a fair and consistent answer.

But suppose the answer to stand irreproachable, how stands the case upon the evidence?

The complainants not only have the strong presumption in their favor arising from the possession of a mortgage regularly executed, acknowledged and recorded, but they prove expressly by their cashier that the bond and mortgage were delivered to and accepted by the bank. This evidence is not overcome by the testimony of Anthony Reckless, the only witness called. Indeed, I think there is enough in the evidence of this witness himself to create a strong impression, if not a decided belief, that the mortgage was, in fact, by authority of his father, delivered, and left by him at the clerk's office to be recorded, though it was not to be available in the hands of the bank until the notes held by the bank were surrendered; the mortgage being intended not as collateral security, but as a substitute for the notes. It is charged, however, in the bill, undenied by the answer, and expressly proved by two witnesses, that the mortgage was intended merely as collateral security. In addition to all this, we have the strongly corroborative circumstances in support of the complainants' title, that the mortgage was suffered to remain on record an encumbrance on the defendant's property, unquestioned by the mortgagor, and that more than a year after its date, it was admitted by the grantee of Reckless to be an encumbrance on the mortgaged premises

---

Commercial Bank v. Reckless.

---

I have no difficulty whatever in disposing of the case made by the defence. The only doubt, it appears to me, arises from the conduct of the complainants. They have not the possession of the bond, or of the policy of insurance; they have never had them since they were returned to Anthony Reckless; so far as it appears they never demanded them—and never had the premises insured for their own safety. And yet I think their conduct may be accounted for rationally and consistently with the truth of their case.

I am of opinion that the complainants are entitled to recover the amount due upon the mortgage; that the decree of the Chancellor must be reversed, but without costs, and the proceedings remitted to be proceeded in agreeably to law.

WHITEHEAD, RANDOLPH and CARPENTER, Justices, and PORTER, SCHENCK, SPEER, SPENCER and SINNICKSON, Judges, concurred.

Decree reversed.



# COURT OF ERRORS AND APPEALS.

JANUARY TERM, 1848.

---

BENJAMIN GEROE AND WILLIAM I. STAGG, APPELLANTS,  
AND CORNELIUS WINTER AND WIFE, RESPONDENTS.

D. G., the testator, gave the remainder of his real estate to his three children—P., the wife of C. W.; C., the wife of W. S., and B. G., in fee simple, to be divided or sold as two out of the three heirs could agree, and appointed W. S. and B. G. executors of the will. *Held*, that the executors had no power in them to sell or to divide the real estate.

---

This case is reported *ante* p. 319.

*D. Barkalow*, for the appellants.

*A. S. Pennington*, for the respondents.

Chief Justice GREEN delivered the following opinion :

The bill, in this cause, states that Daniel Geroe, by his last will and testament, gave the remainder of his real estate to his three children—Peggy, the wife of Cornelius Winter, the complainant; Caty, the wife of William Stagg, and Benjamin Geroe, in fee simple, to be divided or sold as two out of the three could agree, and appointed Stagg and Geroe the executors of his will. It charges that Stagg and Geroe, as *executors* of the said estate, and as *devisees* under his will, sold and conveyed the real estate so devised; that the said sale was *fraudulent* in fact, being made at an under price, by the contrivance of the

---

Geroe v. Winter.

---

respondents, and that it was fraudulent in law, being made to a third person, as the agent of the respondents, and for their benefit, in violation of the rule of law that no executor or trustee can, directly or indirectly, become a purchaser at a sale made by himself.

In the absence of all proof of actual fraud, the case made by the bill, and attempted to be sustained by the evidence, is, that the sale and conveyance, having been made by the respondents, as trustees or executors, indirectly to themselves, is, therefore, fraudulent in law, and void.

In order to sustain the bill, the court must be satisfied that the appellants, as trustees of Winter and wife, or as executors of the will of Benjamin Geroe, sold and conveyed to themselves, directly or indirectly, the title to Winter's share of the real estate.

But I am of opinion that the appellants had no power whatever to sell the share of Winter, either as executors or as devisees.

There is no pretence of any express power vested in the executors to sell the real estate, nor can any such power be implied. The sale was not made for the purpose of settling the testator's estate, for the payment of debts or legacies, or for any purpose which the executors, as such, were authorized to effect. On the contrary, the real estate was devised, by the testator, to his three children, in fee simple, to be divided between them, or sold, as a majority of them could agree. Under this devise, there can surely be no power raised by implication, in the executors, either to sell or to divide the real estate.

Neither was any power conferred upon any two of the devisees, to sell the share of the third, or to divide the land at their pleasure; there was neither a power nor a trust vested in them, for this purpose. All must unite in making the sale or in effecting the partition, or resort, for this purpose, must be had to some judicial tribunal.

The deed, therefore, as to the share of the complainants, Winter and wife, in the real estate sold, was an utter nullity—no title did, or by possibility could, pass by it. The title of the complainants was in them after the sale and conveyance by Geroe and Stagg, as completely as before. It remained unimpaired and unaffected by the conveyance. I cannot conceive, there-

---

Geroe v. Winter.

---

fore, how the court can decree the sale fraudulent, or decree in favor of the complainant, upon the ground charged in the bill. On the other hand, if the court should, upon the merits of the case, decree against the complainants, holding that the sale was not fraudulent, I see nothing that would prevent the complainants from bringing an ejectment and recovering possession of the premises; there is nothing upon the face of the bill or proceedings in this case to estop them from such course.

Inasmuch, therefore, as this sale and conveyance was not made by virtue of any power vested in the appellants, either as trustees or as executors—as, consequently, no fraud in law is established in the making of the sale—as no other ground of relief is stated in the complainants' bill—as the pretended sale and conveyance against which relief is sought is absolutely null and void, and as the complainants have full, adequate, and complete relief at law, I am of opinion that the decree of the Chancellor should be reversed, and that the complainants' bill should be dismissed, but without costs.

I have arrived at this conclusion with much reluctance. The ground upon which I place my decision seems not to have been adverted to before the Chancellor; and, although suggested, it was not discussed in this court. But, entertaining, as I do, a clear conviction of the legal principles which govern the case, and believing that a final decision of the cause upon grounds not charged in the bill, is forbidden alike by sound principle and the settled practice of the court, I am constrained to adopt the course which I have indicated. I feel the less reluctance in doing so, as the decision now made, in substance, accords with the decree of the Chancellor, is a decision of the matter in controversy, and will lead, it is hoped, to an immediate adjustment between the parties.

NEVIUS, WHITEHEAD, and CARPENTER, Justices, and PORTER, SCHENCK, SPEER, and ROBERTSON, Judges, concurred in this opinion. RANDOLPH, Justice, and SPENCER, Judge, voted for affirming the decree. Decree reversed.

NOTE.—The point decided by this court was not presented to the court below, both parties having submitted the question of the validity of the sale on the assumption that the executors had power to sell. The appeal was from the decree of the court below declaring the sale invalid.



# COURT OF ERRORS AND APPEALS.

JULY TERM, 1848.

---

[The official term of AARON ROBERTSON expired February 5th, 1848, and ROBERT H. McCARTER was appointed a judge of this court for six years from that day.]

---

JOSPH E. EDSALL AND ELIAS L'HOMMEDIEU, APPELLANTS,  
AND THE HAMBURGH MANUFACTURING COMPANY AND  
OTHERS, RESPONDENTS.

Several executions had been levied by a sheriff on the lands of "The Hamburg Manufacturing Company," of which the first in priority was in favor of E. The same sheriff had in his hands at the same time an execution issued on a decree in chancery, on the first mortgage, for the sale of the mine farm of "The Clinton Manufacturing Company," and also an execution at law against the said Clinton company, by virtue of which he had levied on the said Clinton company's mine farm. E. held a subsequent mortgage on this Clinton mine farm. Prior to the sale by the sheriff, certain creditors of the Hamburg company, having no judgments, together with E., entered into an agreement in writing among themselves, that L., one of them, should, as their trustee, buy the lands of both companies, as a means of securing their debts against the Hamburg company, including E.'s judgment and other claims he had or made against the Hamburg company, and his mortgage on the Clinton mine farm. There was also an understanding with P., who held the bulk of the stock of both companies, and was carrying on or conducting the business of the Hamburg company, that the said trustee should convey both properties to him, on his paying the debts of the said agreeing Hamburg creditors and the sums for which

---

Edsall v. Hamburg Manuf. Co.

---

the properties should be struck off to the said trustee. The properties were sold by the sheriff and bought by the said L.; the other judgment creditors of the Hamburg company not being present at the sale. The sheriff's deed to L. was absolute. On a bill filed by the Hamburg company and P., it was held that L. was a trustee for the Hamburg company and its creditors, both of the Hamburg property and of the Clinton mine farm.

This case is reported *ante p.* 249.

*S. G. Potts* and *P. D. Vroom*, for the appellants.

*E. N. Dickerson*, *B. Williamson* and *W. Pennington*, for the respondents.

JOSEPH F. RANDOLPH, Justice, delivered the following opinion :

The Hamburg Manufacturing Company was incorporated in March, eighteen hundred and thirty-six, and shortly after was organized, became seized of considerable real estate, and went into operation in the manufacture of iron; and in the January following, Edward W. Pratt became the owner, by purchase, exchange or forfeiture, of nearly all of the stock of the company, and also nineteen hundred and eighty out of twenty-five hundred shares in the Clinton Manufacturing Company, another incorporation for the manufacture of iron, located at no great distance from the works of the Hamburg company; the Clinton company being the owners, amongst other real estate, of a tract of land of about one hundred and fifty acres, on which was a valuable bed of hematite ore, about forty acres and a half of which tract the company sold to the Hamburg company. The two companies jointly opened a mine on that part of the tract remaining the property of the Clinton company, and used the ore for the operations of both companies.

In less than two years, both companies became largely involved in debt, and their property advertised for sale by the sheriff of Sussex county, by virtue of sundry executions issued out of the county and state courts. After repeated adjournments, to enable Pratt or the companies to raise the money and pay off the executions, the sheriff at length sold the property of the two companies, first the personal and afterwards the real estate. On

---

Edsall v. Hamburg Manuf. Co.

---

the seventh day of December, eighteen hundred and thirty-eight, the mine tract of the Clinton company, except the forty and a half acres sold to the Hamburg company, were struck off to the defendant, Elias L'Hommedieu, for the sum of four thousand and forty-one dollars, he being the highest bidder; and on the fourteenth of the same month, all the real estate, including the said forty and a half acres of the Hamburg company, were struck off and sold to the said defendant, L'Hommedieu, for two hundred and eighty-five dollars. A few days after the sale, viz., on the thirty-first of December following, L'Hommedieu executed to Pratt, the complainant, a lease of the premises, purchased for three years, at a yearly rent of three thousand dollars, and on the next day, being the first of January, eighteen hundred and thirty-nine, L'Hommedieu entered into an article of agreement with Pratt to sell him the premises for thirty thousand dollars, payable in installments. During the residue of the winter and spring, various unsuccessful efforts seem to have been made by the parties to raise money and put the works in operation, or to sell the premises; at length, in the succeeding June, Pratt and L'Hommedieu started to go to New York to obtain a loan of money or a purchaser for the premises, but at Newark Pratt was arrested and thrown into prison for debt, from whence, in due course of law, he was discharged as an insolvent debtor, making David Jones and Elias Freeman his assignees under the statute, and at a subsequent period, he made to Joseph B. Nones, of the city of New York, a special assignment of his estate and interest; and these three persons, claiming to be assignees, together with Pratt and the Hamburg Manufacturing Company, constitute the complainants in this cause. Some time in June, after Pratt was arrested, the defendant, L'Hommedieu, claiming under the sheriff's deeds, and Edsall, one of the principal creditors and a mortgagee of the Hamburg company, entered into possession of the premises in question, and since then have continued to hold the same and to use the furnace and ore, in the manufacture of iron, to a very considerable extent, paying off some of the creditors of the Hamburg company, buying up others at a discount, and leaving others unarranged, one or two of which have been transferred to and are now held by Pratt. In addition to L'Hommedieu



---

Edsall v. Hamburg Manuf. Co.

---

and Edsall, the bill also makes the several creditors interested in the Hamburg property defendants, all of whom, except L'Hommedieu and Edsall and Daniel Haines, one of the creditors, have suffered a decree *pro confesso* to be taken against them. Mr. Haines has filed a separate answer and the other two defendants a joint one.

The complainants charge in their bill that L'Hommedieu purchased the property as a trustee, in the first place to pay off the encumbrances and the claims of such creditors as came into a certain arrangement entered into prior to the sale, and, lastly, for the company, to whom was reserved a reversion or right of redemption on payment of said encumbrances and claims, and in pursuance thereof they pray an account to be taken of the same, and also of the property purchased, and the rents, issues and profits thereof, and the personal property of the complainants received by the defendants, and that the deed may be declared a trust deed and the trusts be executed, and the complainants be permitted to redeem on payment of the balance due, &c. The defendants, by whom may be understood L'Hommedieu and Edsall, deny the trust any further than for the creditors who came into the arrangement prior to the sale, and insist that none of the complainants have any interest in the premises; whatever they had being, as alleged, cut off by the sheriff's sale and deeds.

The *onus* of proof is on the complainants, and the answer being responsive to the bill, must be overcome by sufficient and satisfactory evidence. The arrangement referred to as made prior to the sale, consists of certain articles of agreement entered into in writing, on the seventh of December, eighteen hundred and thirty-eight, by L'Hommedieu, Edsall and others, being a large number of the creditors of the Hamburg company, some of whom had liens and some not, by which L'Hommedieu was appointed a trustee, to purchase in at the sheriff's sale the Hamburg property, and also the Clinton property whereon is the ore bed, and to raise by bond and mortgage a sufficient amount of money to pay off the purchase money, the liens on the property and the creditors who came into the arrangement, and also two thousand dollars to put the furnace in operation, with power also to lease the property "to some suitable competent

---

Edsall v. Hamburg Manuf. Co.

---

person," and also, if he, the lessee, desires it, "to sell to him the premises, upon his securing to the trustee the payment of the whole costs of the premises, including our respective claims, with interest." As neither Pratt nor the Hamburg company appear on the face of this agreement to be parties thereto, it is insisted by the defendants that this writing will cut off any prior parol negotiations if there were any; but this being a mere arrangement of the creditors themselves to screen their claims, by appointing a trustee to purchase the property and so dispose of it as would answer their object, it was not proper that the defendants in execution, in which light Pratt as well as the company may be considered as standing in this court, should be parties thereto, particularly as the agreement did not embrace all the creditors. If, then, the complainants have any claim on the trustee or trust property, we must look beyond the article of agreement, which could in no way bar the rights of those who could not in the nature of things be a party to it, or be a waiver or merger of any prior agreement made with or by them. It was competent for all or any of the creditors to purchase the property, personally or by an agent or trustee, and take the same exclusively to themselves, without any arrangement with any of the complainants; but the question is, did they do so? or was there any and what arrangement made with Pratt or the company? The debts of the company are estimated at about thirty thousand dollars; but the executions by virtue of which the Hamburg property was sold, amounted, exclusive of interest and costs, to less than seven thousand dollars; besides these there were several mortgages, the whole encumbrances amounting to about seventeen thousand dollars, leaving debts of from ten to thirteen thousand dollars without lien or security; and these creditors as well indeed as the judgment creditors, felt some fears for the safety of their claims, more probably from the magnitude of the property and the difficulty of finding a purchaser than from a deficiency in its real value. We accordingly find that whilst Pratt was endeavoring to negotiate a loan, the creditors were also endeavoring to arrange matters by securing a loan or otherwise, in case a sale became inevitable, so as to secure their interests respectively. No formal agreement, however, appears to have been entered into by the creditors until on the day of

---

Edsall v. Hamburg Manuf. Co.

---

sale, the seventh of December. On that day, we learn from the evidence, that not only the creditors were present, but Pratt was there also with Aaron B. Nones as a friend to purchase the property, and David Ryerson and others, who felt an interest in the property, and of those concerned therein. Although the property had been advertised for sale for a long time by the sheriff, and repeatedly adjourned, yet it seems Pratt had been unable to obtain a loan of money to prevent the sale; yet it is not probable that he would have permitted the property to have been entirely sold from him if he could prevent it, for although the extravagant value he appears to have set on the property, as well as on the Erie lots given in exchange therefor, may excite a smile, yet it abundantly appears from the whole case that he considered it of sufficient importance to him to make every exertion and arrangement in his power to prevent his interest in the company from being entirely swept away by an absolute sale. He states in his bill that he attended the sale with Nones, as the agent of a friend, prepared to purchase the property if it should become necessary. This allegation does not seem to be clearly denied by the answer. All the witnesses agree that Nones was at the sale, and many of them understood him as there in the character of a purchaser. He says himself, in his evidence, that he went there for his brother, John B. Nones, to purchase the property if it should become necessary, and that, for that purpose, he took with him about eleven or twelve thousand dollars, and had authority to draw for as much more as might be necessary—the whole amount of executions on which the sale of the Hamburg property and of the Clinton Mine tract together amounting to less than eleven thousand dollars. It also appears from the evidence of Joseph M. Brown that Nones took money with him. As none of this evidence or the complainants' allegation in the bill is answered or disproved, we must take the fact as satisfactorily established, that Nones was at the sale to purchase the property for the benefit of Pratt, and prepared with the means in hand to do it, and that Pratt knew of it, for he went with him from New York. Now it does not appear that there were at the sale any others prepared for the extremity as well as Pratt and Nones were; they, therefore, must have had the advantage of the creditors, who seem to have been



---

Edsall v. Hamburg Manuf. Co.

---

well aware of that fact, for if the sale had gone on, from all that appears in the testimony, Pratt's friend might have purchased the property for little over the amount of the encumbrances and have shut out all the claims which were not liens on the premises; hence the anxiety of the creditors that some arrangement be made, and the various efforts from time to time to make combinations or secure loans to effect their object; hence the anxiety of Mr. Ryerson and others to secure a loan to protect their friends and the small creditors. If Pratt occupied this advantageous position, it is not probable that he would have relinquished it without some equivalent; but he did relinquish it, and suffer the Hamburg property to be sold for two hundred and eighty-five dollars in the aggregate, by small parcels, and for small sums. Nones was in favor of the arrangement, and made no bid; Pettis was also stopped from bidding by the same consideration. How is this? Neither Pratt or the company have any part or lot expressly in the written agreement of the creditors, yet Pratt was there and consulted about the arrangement, and was informed of the course of proceeding, at the instance of Mr. Haines, lest he might frustrate the matter. At one time he comes out from the room where the creditors were in consultation, with a written paper in his hand, which he said were propositions to him; the witness proves a copy, which looks very much like the allegations in the bill, but as the original was not accounted for in proof, it is unnecessary to remark on the contents of the copy. The creditors' agreement authorizes a lease, and although Pratt is not named, a majority agree that he was to be the lessee and also the purchaser for the costs and interest; and of the money which the trustee was authorized to loan, two thousand dollars was to be appropriated to put the furnace in blast, and this before the creditors without liens were to be paid. All this goes to show that the parties did not consider the sale as absolute, or to be of very long duration, but rather of some temporary arrangement to secure the creditors, until by a sale or loan the matter could be placed on a permanent footing. A few days after the sale the trustee, L'Hommedieu, executes the lease and agreement to sell to Pratt; now if this was not done in pursuance of a prior agreement, why was it done? The creditors had no great confidence in Pratt, they had indeed but little reason to have,

why should there have been a loan to him for three years, without security, and a bill of sale for the property, for thirty thousand dollars, and an appropriation of two thousand, to carry on the furnace? These facts and circumstances lead, irresistibly, to the conclusion that the sale was not considered, by the parties, as absolute and beyond redemption, but that Pratt, either for himself or the company, has a reversionary right, and does not stand as a mere ordinary purchaser, who has been unable to comply with his agreement; and this conclusion is supported, I think, by the weight of the parol evidence, taken in connection with the circumstances. David Ryerson says there seemed to be a perfect understanding between Pratt and the creditors; he was consulted—was to have the management; that L’Hommedieu purchased it for the benefit of the creditors, “and was to hold it in trust for them *until the debts and claims of the company were settled.*” There certainly is some discrepancy in the testimony—several witnesses testify against any such understanding; but, without recurring to the testimony of each witness, I cannot but conclude that the decided weight of testimony is in support of the bill. All agree that L’Hommedieu purchased as a trustee, and not an absolute estate. The written agreement makes no provision for a surplus; in case there should be one, to whom does it go? Not to the creditors, for then they would be paid off; not to the trustee, for he cannot speculate on his trust. It must be by clear implication, if not otherwise, for the complainants. But the circumstances go to sustain the bill and show there must have been an agreement. Whilst the lease has nearly three years to run, and, before the first payment on the article of sale becomes due, the defendants, L’Hommedieu, as trustee, and Edsall, as creditor and mortgagee, take possession of the premises and carry on the works to the present time. Walker does not seem to have had authority for delivering up the premises, and the mere verbal statement of Pratt, whilst in prison, with all the papers remaining open and executed, can hardly be taken as a relinquishment. I think, after a review of all the facts, that that part of the Chancellor’s decree directing an account to be taken of the Hamburgh property, should be affirmed.

Another question in the case remains to be disposed of, arising

---

Edsall v. Hamburg Manuf. Co.

---

on that part of the decree which determines that the complainants are not entitled to relief as to the Clinton mine tract, because the sale was fraudulent. I have been unable to come to the same conclusion, either as to the decree or the reasons therefor. This tract of land belonging to the Clinton company was regularly advertised and sold by the sheriff of Sussex, by virtue of two executions in his hands, and L'Hommedieu being the highest bidder, it was struck off to him accordingly. It is true, Mr. Edsall had a mortgage on the premises, younger than the executions, and was at the sale to protect his rights, by purchase or otherwise, and I can see no fraud or impropriety in the Hamburg creditors agreeing that their trustee should purchase the tract upon the best terms that it could be obtained, and, if necessary for that purpose, to agree to pay-off Edsall's mortgage, though younger than the executions by virtue of which the sale took place. This was doing no injury to the Clinton company or their creditors. The sale, then, being a *bona fide* sale to the highest bidder, is neither fraudulent or void, but is good and valid against the Clinton company and its creditors. Nor is there anything in the agreement between Pratt and the Hamburg creditors, or between them and the defendants, or either of them, that can be considered fraudulent. If L'Hommedieu had not purchased it, of course Edsall would have done so to secure his mortgage, and, in either case, the general creditors of the Clinton company would have been shut out from any claim on the property; and, if all the interest of the Clinton company and their creditors was disposed of at the sheriff's sale, they had no right to be made parties to the present suit, and, of course, the bill cannot be dismissed, either for that cause or the alleged fraud. The next inquiry is, if the sale was good and valid, in what character, and for what purpose did L'Hommedieu purchase? Why, clearly, as trustee and for the benefit of the trust generally. The very first clause of the article of agreement of December 7th, 1838, amongst the Hamburg creditors, states, "And whereas, for the purpose of endeavoring to secure ourselves, we deem it advisable to purchase the said real estate—i. e., the Hamburg property—and also certain real estate of the Clinton Manufacturing Company, situate, &c., whereon is an ore bed, advertised by the said sheriff, therefore, &c., we



do hereby constitute Elias L'Hommedieu our agent and trustee, in his own name, and for his own behalf and use, *to purchase the said properties,*" &c. Either, then, we must agree with the Chancellor and declare the sale fraudulent and void, or if good, we must decree that the purchase was by the defendant in trust for others. The disagreement to the first position necessarily affirms the second. If L'Hommedieu then purchased and held the Clinton property as a trustee, for whom was the trust? There can be little doubt in concluding that it was for the same persons for whom he purchased in and held the Hamburg property; and if we concur with the Chancellor in saying that that was subject to a general trust for the complainants, so we must say in regard to the mine tract, otherwise we come to this strange conclusion, that the complainants are entitled to the redemption of the Hamburg property after paying the debts due to the creditors, together with the expenses, &c.; but as to the Clinton mine tract, although purchased and held as a trust, yet neither the complainants or the creditors who appointed L'Hommedieu agent and trustee, can have any interest in or benefit from it; the creditors cannot, because they will be all paid off by the redemption, and of course they cannot be permitted to speculate on the trust property when there is a general trust or right of redemption behind them; and the complainants cannot by our decree; so that between the two, the defendants would hold the property absolutely free and clear of either trust; a conclusion, I apprehend, which no one would be willing to adopt. And although this is a mere bill for the redemption of the Hamburg property, I see no difficulty in sustaining and carrying out in the present suit the trust in regard to the Clinton mine tract. The Hamburg property is large and valuable, but its value very much depends on the ore to be obtained from the Clinton tract. The whole was about to be sold at sheriff's sale; certain creditors and the complainants agree that the sale shall go on, and that the defendant, L'Hommedieu, shall purchase it for their benefit, not only the iron works and property attached to them, but also the mine tract. The purchase is made accordingly, and when the defendants refuse to execute the trust with the complainants, we deem that the trust is valid, and that defendants shall give effect to the whole trust—that is,

---

Edsall v. Hamburg Manuf. Co.

---

although the complainants have no right of redemption in the mine tract, yet, before they pay anything to redeem the property, they have a right to a strict account of all the trust property, and the rents, issues, and profits thereof, and a sale of the mine tract, and that the balance arising therefrom, after paying all the claims on the tract itself, including Edsall's mortgage—for that was to be paid by the agreement—should go to liquidate the claims against the Hamburg company, embraced in the trust, and thus lessen the amount to be paid by complainants for the redemption. This conclusion results, necessarily, from the transaction, the whole property being *bona fide* sold, and bought by the defendant, in trust, to pay off certain creditors and claims, and, ultimately, after these claims were discharged, to be held for the benefit of the complainants. If they come forward and pay off all those claims, they have a right to the property, and, whether mine tract or Hamburg estate, the court must consider them held in trust for their benefit. It must be so, unless we conclude the sale was fraudulent and void. I think that this part of the decree should be reversed, and neither party allowed costs in this court.

WHITEHEAD and CARPENTER, Justices, and PORTER, SCHENCK, and SPENCER, Judges, concurred in this opinion.

NEVIUS, Justice, voted for affirming the whole decree.

Decree affirmed, as to the Hamburg property, and reversed as to the Clinton mine farm, this, also, as well as the Hamburg property, being decreed to be held by L. in trust for the Hamburg company and its creditors.

# INDEX.

## A.

### ABATEMENT (OF LEGACY.)

*Vide* WILL, 4.

### ABSENCE.

On bill stating that J. B. S. left the state more than seven years before, and had not been heard from, and founded on the presumption of his death thence arising, and answer admitting the absence, but denying that he had not been heard from, and stating that the defendants are informed and believe that he had been heard from, and replication—*held*, that unless the defendants made proof that J. B. S. was alive within the seven years, the presumption of his death arising at the expiration of the seven years stood. *Smith v. Ex'rs of Smith*, 484

### ACCOUNT.

*Vide* PREROGATIVE COURT, 3, 6.  
SPECIFIC PERFORMANCE, 3.  
EXECUTORS AND ADMINISTRATORS, 1, 2, 3, 4.

### ADMINISTRATION BOND.

*Vide* PREROGATIVE COURT, 1, 2.

### ADMINISTRATORS.

*Vide* EXECUTORS AND ADMINISTRATORS.

### ADVANCEMENT.

*Vide* PREROGATIVE COURT, 4, 5.

## AFFIDAVITS.

On motion on bill and notice for an injunction and the appointment of a receiver, the affidavit of the defendant may be read in opposition. *Kean v. Colt*, 365

*Vide* AMENDMENT, 3.

## AGREEMENT.

*Vide* SPECIFIC PERFORMANCE, 4, 5, 6, 7, 8, 9, 11.

## ALIMONY.

1. Alimony pending the suit, and money to defray the expenses of it, allowed on a bill by the wife against the husband for support and maintenance, charging that he had abandoned her and refused to maintain and provide for her. *Paterson v. Paterson*, 389
2. On bill by a wife against her husband for alimony and maintenance, and for the support and maintenance of their child, and answer put in by the husband, and petition filed by the complainant for a proper allowance until the final termination of the suit, and for an order directing the defendant to pay a proper sum for counsel fees and to defray the expenses of the suit, the court, under the circumstances of the case, made an order directing the husband to pay \$2.50 per week towards the support of the child and the complainant, while she should keep the child, until the further order of the court; and made no order as to counsel fees and expenses of the suit. *Ballentine v. Ballentine*, 471



## AMENDMENT.

1. An application for leave to amend an answer, or file a supplemental answer after depositions have been taken, should be listened to with distrust. *Bell v. Hall*, 49
2. The defendant had answered that he did not know of a certain agreement until after the assignment to him of a certain judgment and execution. The execution had been levied on the goods of the defendant in the execution. The defendant in this court, who had put in his answer, had released the goods levied on from the lien of the execution. He moved for leave to amend his answer by stating that he did not know of the agreement until after he had executed the release, or for leave to file a supplemental answer to make that allegation. The motion was denied. *Ib.*
3. What the affidavit on which an application for leave to amend an answer or file a supplemental bill should in general state. *Ib.*

## ANSWER.

*Vide* PLEADINGS, III.

## APPEAL.

1. An appeal lies from an order dissolving an injunction. *Chegary v. Scofield*, 525
2. The appeal itself does not stay proceedings on the order appealed from. *Ib.*
3. After appeal, the Court of Errors and Appeals may stay proceedings on the order appealed from; and this power extends to orders dissolving injunctions. *Ib.*
4. An order of the Court of Errors and Appeals staying proceedings under an order dissolving an injunction, which last order was appealed from, was, under the circumstances of the case, vacated at the next subsequent term. *Ib.*
5. No appeal lies from the decree of the Ordinary or surrogate-general

in the matter of the assignment of dower. *Anthony v. Anthony*, 627

6. On bill filed, the complainant had obtained an injunction restraining the defendant from aliening or encumbering certain real estate which was in controversy between the complainant and defendant and from collecting or receiving the rents; and had also obtained an order appointing a receiver of the rents and profits. Afterwards, the Chancellor made an order authorizing the receiver, instead of collecting the rents himself, to permit the defendant to do it for him, until the further order of the court, upon the defendant's giving bond with satisfactory security for the payment to the receiver of the rents received by him. Held that such order could not be appealed from. *Garr v. Hill*, 639

## ASSETS.

1. Character of assets whether legal or equitable. *Corrigan v. The Trenton Delaware Falls Company*, 232
2. Distribution of assets. *Ib.*

*Vide* HEIRS AND DEVISEES, 1.

## ASSIGNMENT AND ASSIGNEE.

*Vide* CORPORATIONS, 8, 9, 10.  
MORTGAGE, 3.  
SPECIFIC PERFORMANCE, 3.

## ASSIGNMENT (FOR BENEFIT OF CREDITORS.)

*Vide* MORTGAGE, 1.

## ATTACHMENT.

*Vide* MORTGAGE, 1.

## B.

## BILL.

*Vide* PLEADINGS.

## C.

## CONTRACT.

*Vide* AGREEMENT.

## CORPORATIONS.

1. The impression of a distinctive corporation seal on an instrument calling for the seal of the corporation held to be a seal. *Corrigan v. The Trenton Delaware Falls Company*, 52

2. A corporation being embarrassed in its circumstances, six of the stockholders, two of them being also directors, entered into an agreement, that at any sale that might be made of the property of the company, either on execution or by the direction of the company, the property should be bought by two of the stockholders who were parties to the agreement, on the best terms possible, and that the property, when so purchased, should be held by them in trust, half for themselves, and half for the other parties to the agreement, each party to the agreement to pay, *pro rata*, for the purchase of the property, according to his interest in the same to be thereafter declared. Two days after the making of this agreement, the two directors who were parties to it and two other directors of the company, by an instrument executed under their individual hands and seals, conveyed to the stockholders, who, by the said agreement, were to be the purchasers, for a money consideration acknowledged in the instrument to have been received, all the personal property of the company. On the day after this last writing was made, a judgment was confessed by the company, and a *f. fa.* issued thereon and levied on all the property of the company. A few days afterwards, in pursuance of a resolution passed by the votes of one of the directors who was a party to the said agreement, and two other directors of the company, the president of the company executed and delivered to the two stockholders, who, by the agreement, were to buy the property, a deed of all the real estate of the company, for a money consideration therein acknowledged

to have been received, subject to the said confessed judgment. The two stockholders, to whom all the property of the company was thus conveyed, then procure an assignment of this judgment, and cause the sheriff to advertise for sale, by virtue of the execution issued thereon, all the property of the company. On a bill filed by a subsequent judgment creditor of the company, an injunction was allowed restraining the sale. An answer was put in, stating that it was a part of the arrangement, that the consideration money for the property should be paid and applied directly on account of the company to the creditors thereof, and that they, the two stockholders to whom the property was conveyed, should pay, out of the net earnings of the half held by them in trust for the other parties to the arrangement, after paying the costs of completing and putting the works in operation, a further sum sufficient to satisfy the remaining debts of the company; and that they should put the machinery in operation, and make it productive as soon as circumstances would permit. A motion to dissolve the injunction was denied. *Smith v. Loomis*, 60

3. The act incorporating "The Somerville Manufacturing Company" provides that the stock, property and concerns of the company shall be managed and conducted by five directors, one of whom shall be president; and that the president and directors, or a majority of them, shall and may appoint such officers, superintendents and agents as they may think proper; and that the president and directors, or a majority of them, shall have power to call in installments on the stock. Can two of three directors assembled make a mortgage of the lands of the company? Can two of three directors assembled make a mortgage to the third? *Van Hook v. The Somerville Manufacturing Company*, 137

4. The book of minutes of a corporation is only *prima facie* evidence of the correctness of the entries made in it. The appearance of the minutes may, of itself, raise so strong a suspicion against the regularity of

- the proceedings, that no weight will be given to them. *Ib.*
5. The corporate seal may be affixed by a less number of directors than is necessary to constitute a board, if it be done by the direction of a legal board. *Ib.*
  6. If, on a notice to all the directors, a meeting be held, at which some of them do not attend, and an adjournment is made to a subsequent day, is the meeting on the subsequent day a meeting on due notice to all the directors? *Ib.*
  7. The consent of a director not sitting in a legal board is nugatory. *Ib.*
  8. If a mortgage be given, even by a competent board of directors, to one of their number who is the financial agent of the company, to enable him to raise money for the company, on his representation that the money needed by the company could not be raised on the bond and mortgage of the company given directly to any lender; or after failure to raise money for the company, and on his representation that he could raise the money on a bond and mortgage of the company executed to him, by an assignment of it, allowing a greater rate of interest than the legal interest, it would be a fraud against the company to enforce the mortgage against them as a mortgage to him for his own use and benefit; and if he attempt to do so, he will be held to have procured it by fraud. *Ib.*
  9. In general, fraud in the obligee in obtaining a bond is a good defence against an assignee of the bond, though he be a *bona fide* purchaser of it without notice of the fraud. But it was held that a *bona fide* assignee without notice of a bond and mortgage given under the circumstances, and for the object before stated, might enforce them against the company. *Ib.*
  10. Certain certificates of the director who was president, one signed by him as an individual, stating that the bond and mortgag was executed by him as president, by order of the board, "as said amount was due to the obligee as agent of the company," and the other signed by him as president, stating that the board having examined the account of the obligee against the company, did pass the same and acknowledge a balance due the obligee of \$9638.17; and a copy, signed by the secretary of the company, of what purported to be a resolution of the board, that the bond and mortgage was a legal and subsisting liability of the company, and that they had no defence to make to the same, which writings were procured by the obligee to aid him, as he said, in negotiating the bond and mortgage, were exhibited on the part of the complainant, to show good faith in taking the assignment. Before the complainant took the assignment, he was told by the president that he, the president, considered the property would be worth \$20,000 when in operation; that if he, the complainant, had the money to spare he could not put it out more safely; that they were anxious to get the money and have the works in operation, and that if they could obtain the money on the bond and mortgage, they would be able to put the works in operation. After this, the complainant took the assignment of the bond and mortgage, and in exchange, or alleged exchange therefor, made a deed of leasehold property in New York to a son of the obligee; and the complainant produced in evidence a certified copy of a mortgage made by the son to one Morgan, dated August 23d, 1842. There was no evidence given to show when the assignment to the complainant was delivered, or the deed to the son; whether on the day the mortgage was made by the son or not; but it appeared that an assignment of the bond and mortgage was left by the obligee in the office of the clerk of Somerset, on the 1st of August, 1842, and recorded after the 9th of August, 1842. No account was given of the mortgage made by the son, except that the witness of the complainant who produced the certified copy of it, stated that he had seen it in New York the morning of the day of his examination, in the hands of one Edward P. Clark, and that "he could not get the original out of the office; they refused to let him have it." Held that the complainant could not be considered a *bona fide* purchaser of the



bond and mortgage for consideration paid; and *held further*, that the information he received from the president was sufficient notice to overcome the evidence offered of *bona fides*, if that had been sufficient to show it. *Ib.*

*Vide* FRAUDS BY INCORPORATED COMPANIES.

COSTS.

On bill by a wife, by her next friend, against her husband for alimony and maintenance, a motion on the part of the defendant that the complainant file security for costs was denied. *Ballentine v. Ballentine*, 519

*Vide* SET-OFF, 1.

COURT OF ERRORS AND APPEALS.

*Vide* APPEAL, 1-5.

CREDITORS' BILL.

*Vide* SET-OFF, 1.

D.

DECREE.

*Vide* EVIDENCE, 3.  
PRACTICE, 4.

DEED.

*Vide* LAND, 1.

DELIVERY, 1, 2, 3.

EXECUTORS AND ADMINISTRATORS, 6.

DELIVERY.

1. The possession of a mortgage, obtained from the clerk's office by the person named therein as mortgagee, without the consent of the mortgagor, and after he had refused to deliver the bond to secure which the mortgage was given, is no evidence of the delivery of the mortgage. *The Commercial Bank of New Jersey v. Reckless*, 430

2. To constitute the delivery of a deed, the grantor must part not only with the possession, but with the control of it, and deprive himself of the right to recall it. *Ib.*

3. To make the leaving of a deed by the grantor with the clerk for registry, and the registration thereof, a good delivery to the grantee, it must be left for the grantee, or with such directions from the grantor as to amount to a delivery, and authorize the grantee to take it from the clerk. *Ib.*

4. Allegation of the delivery of a bond and mortgage not sustained by evidence. *Ib.*

5. The possession by a mortgagee of a mortgage executed and recorded in, in itself, cogent evidence of delivery. *Commercial Bank v. Reckless*, 650

6. The answer of a mortgagor to a bill of foreclosure, denying the delivery of the mortgage is not, in itself, sufficient to overcome the presumption of delivery arising from the possession of the mortgage by the mortgagee duly executed, acknowledged and recorded. *Ib.*

7. What evidence held sufficient of the delivery of a mortgage, though the bond to secure which the mortgage was given, was in the possession of the obligor. *Ib.*

*Vide* HUSBAND AND WIFE, 5.

DEVASTAVIT.

*Vide* LEGACY, 2, 3.

DEVISE.

*Vide* PREROGATIVE COURT, 6.  
WILL.

DEVISEES.

*Vide* HEIRS AND DEVISEES.

DISTRIBUTION.

*Vide* PREROGATIVE COURT, 3.

## DOWER.

*Vide* WILL, 1, 2.

## E.

## ENROLLMENT.

*Vide* PRACTICE, 4.

## ESTATE.

*Vide* TRUST AND TRUSTEE, 2, 3.

## EVIDENCE.

1. Parties are confined to the case made by the pleadings; and evidence to facts not put in issue cannot be read. *Ex'r of Cavalier v. Huffman*, 354
2. Testimony in disproof of a fact confessed by the pleadings cannot be considered. *Ib.*
3. A decree against executors, in a suit against them, is no evidence in a subsequent suit against the devisees of the existence of the debt. *Adm'rs of Hazen v. The Heirs and Devisees of Tillman*, 363
4. What proof held satisfactory of the existence, genuineness and loss of a receipt or acquittance from a deceased person. *Williamson v. Adm'rs of Johnson*, 537
5. It is not competent to show by parol that at the time of executing a bond, the obligee agreed that the obligor should not be personally liable, but that the obligee would look for payment to the mortgage given to secure the bond. *Chetwood v. Brittan*, 628

*Vide* PLEADINGS, II., 11.

HUSBAND AND WIFE, 3.

## EXECUTORS AND ADMINISTRATORS.

1. A note given to a testator in his lifetime, by one who was appointed a co-executor of his will, was inventoried by the two executors as a part of the assets of the estate; and in a

joint account settled by the executors in the Orphans' Court, they charged themselves with cash received on the said note in full. *Held*, in the absence of any explanation, that both executors were liable to the residuary legatees for the whole balance struck against them in the said joint account. *Wilson v. Ex'rs of Fisher*, 493

2. A note given by one of the said executors to a legatee, on account of his share of the residue, which note was not paid, but which the other executor set up as a payment, was held to be no payment. *Ib.*
3. One of the executors paid four shares in full, to four of five residuary legatees, and a part of the fifth share to the other legatee; and on a bill filed by the latter against the executors for the residue of his share, set up that he had paid out all he had in his hands of the balance found by the said joint account, and that the other executor, who had since become bankrupt, had received enough of the said balance to pay what remained due the complainant. Is this a defence? *Ib.*
4. It is not necessary to tender to executors a refunding bond before filing a bill for a legacy. *Ib.*
5. J. C. died March 15th, 1833, leaving a will by which he ordered all his debts to be paid, and gave and bequeathed to his widow all his estate, real and personal, during her natural life or widowhood, and appointed her sole executrix thereof; the will containing no devise or bequest of the estate after her death. The testator left a grandson his only heir-at-law. The widow and the grandson and his family occupied the dwelling-house and lands, and converted the personal property to their own use. On the 24th of July, 1834, the widow and the grandson and his wife conveyed all the real estate to T. B. S. On a bill filed by a creditor of the testator attacking the *bona fides* of the sale, and the answer and proofs in the cause, the deed was declared void, and the lands held liable for the complainant's debt. *Ex'r of Cooper v. Cooper*, 498

6. An executor with power to sell land exposed the land for sale at public vendue on the 11th of March, 1789, and no person bidding what he thought a sufficient price, requested his son to bid for it, and the son accordingly bid \$5.25 per acre. The executor postponed the sale on that bid, and gave notice that if any person would come forward and give more, he would sell the land to the person offering the best price; and that if no person offered a better price within a reasonable time, he would sell the same for the sum so bid by his son. No subsequent day was fixed for further bid-dings. On the 9th of August, 1792, the executor conveyed the land to his son, at the sum so bid by him, and the son, on the next day, reconveyed the land to his father, the executor. No consideration passed, nor any security for any consideration, on either conveyance. The conveyances were set aside as fraudulent, and it was ordered that the land be sold under the direction of a master, and that the proceeds be brought into court. *Williamson v. Admrs of Johnson*, 537
7. The land was sold in 1812, under the direction of a master, and the proceeds brought into court. It was then ordered that the proceeds be paid to the executor on his giving bond with surety conditioned for the performance of the trust reposed in him by the will, (by which the proceeds were to be equally divided among the five sons of the testator, of whom the executor was one.) The executor, after receiving the proceeds, died, and administration of his personal estate was granted. In 1820, one of the five sons died, and the administrator of his personal estate caused a suit to be prosecuted against the surety on the said bond, to recover the share of the said deceased son; and in February, 1822, recovered final judgment for \$2202.46. Pending the said suit, by deed dated June 5th, 1821, the surety, with his wife, conveyed his real estate to his son and daughter; the consideration expressed in the deed being \$10,000; the deed containing full covenants. This deed was acknowledged September 29th, 1821, and recorded October 1st, 1821. Execution was issued on the said judgment, and in May, 1823, all the right, title and interest of the said surety in the real estate he had so conveyed was sold by the sheriff, on the said judgment against the surety, and the surety's said son and daughter bid \$3000 for the same, and it was struck off to them. The money was paid to the sheriff by them, or one of them; and the sheriff paid thereout, to the administrator of the said deceased son, the full fifth for which the said judgment had been obtained. In March, 1824, the administrator of the executor and the surety filed a bill of review, alleging errors in the decree setting aside the deed made by the executor in August, 1792, and setting up on the part of the surety, that the executor had paid to the said deceased son, in April, 1792, a sum equal to a fifth part of the sum at which the land had been struck off by the executor to his son, in March, 1789, and had obtained the acquittance and discharge of the said deceased son for his share in full; and praying divers matters on the part of the said administrator of the executor, and praying on the part of the surety that the said judgment against him be set aside, and that the administrator of the said deceased son might repay to the said surety all moneys received by him over and above what should have been received by him for the share of the said deceased son. To this bill a plea and demurrer were filed, which were allowed on the 15th of October, 1827; and an order was then made, giving leave to amend the said bill by striking out the name of the administrator of the executor as complainant, and the names of all the defendants except that of the administrator of the deceased son, and so much of the said bill as seeks a review of the said decree, so as to confine the object of the bill to the relief sought by the said surety against the said judgment, and execution obtained against him on the said bond. On the 28th of January, 1828, the surety filed his bill confining the relief he sought as directed in the said order. In October, 1843, upon the report of a master, (to whom the matter had been referred by an interlocutory decree,) stating that on the 2d of April, 1792, the executor had paid



the deceased son \$350.66, and that the excess of the judgment against the surety over the amount due at the time of the judgment, on the share of the said deceased son, with interest on such excess, amounted to \$2256; a final decree was made by the Chancellor for that sum against Asher Williamson; (he was the administrator of the deceased son;) and that execution issue therefor against the goods and chattels, lands and tenements of the said Asher Williamson. On appeal to the Court of Errors and Appeals, the decree was affirmed. *Williamson v. Adm'rs of Johnson*, 537

8. If an executor receive the effects of his testator, and does not apply them in due course of administration, his estate is liable, and his executor may be called upon in equity to pay the legacies in due course of administration of the assets which came to his hands. *Ex'r of Moore v. Smith*, 649

*Vide* HUSBAND AND WIFE, 4.  
SPECIFIC PERFORMANCE, 3.  
EVIDENCE, 3.  
LEGACY, 2, 3.  
WILL, 5.  
PLEADINGS—ANSWER, 6.

## F.

### FEME COVERT.

*Vide* HUSBAND AND WIFE.

## FRAUD.

1. A sheriff's sale of land declared unlawful by reason of means used to prevent competition, and the consequent sacrifice of the property. *The Hamburg Manufacturing Company v. Edsall*, 249
2. Several executions had been levied by a sheriff on the lands of the Hamburg Manufacturing Company, of which the first in priority was in favor of E. The same sheriff had in his hands, at the same time, an execution issued on a decree in chancery, on the first mortgage, for the sale of the mine farm of the Clinton Manufacturing Company, and also an execution at law against

the said Clinton company, by virtue of which he had levied on the said Clinton company's mine farm. E. held a subsequent mortgage on this Clinton mine farm. Prior to the sale, certain creditors of the Hamburg company, having no judgments, together with E., entered into an agreement in writing, among themselves, that L., one of them, should, as their trustee, buy the lands of both companies, as a means of securing their debts against the Hamburg company, including E.'s judgment and other claims he had or made against the Hamburg company, and his mortgage on the Clinton mine farm. There was also an understanding with P., who held the bulk of the stock of both companies, and was carrying on or conducting the business of the Hamburg company, that the said trustees should convey both properties to him, on his paying the debts of the said agreeing Hamburg creditors, and the sums for which the property should be struck off to the said trustee. By these means competition was prevented, and the properties were sold at a sacrifice, and bought by L., one of the agreeing Hamburg creditors; the other judgment creditors of the Hamburg company not being present at the sale. The sheriff's deed to L. was absolute. On a bill filed by the Hamburg company and P., it was held that the sales of both properties were unlawful; and that L. was a trustee of the Hamburg property for the Hamburg company and its creditors; but that as to the Clinton property no decree could be made, the Clinton company not being parties to the suit. *Id.*

*Vide* PARTNERS, 4.

EXECUTORS AND ADMINISTRATORS, 5, 6.

CORPORATIONS, 2, 8, 9, 10.

## FRAUDS BY INCORPORATED COMPANIES.

Proceedings under the act to prevent. *Corrigan v. The Trenton Delaware Falls Company*, 232

## FRAUDS, (STATUTE OF.)

*Vide* TRUST AND TRUSTEE, 6.

## FRAUDULENT CONVEYANCE.

Vide EXECUTORS AND ADMINISTRATORS, 6.

## G.

## GUARDIAN.

Vide LUNACY.

## H.

## HABEAS CORPUS.

An infant daughter ordered to be delivered to her father, on a *habeas corpus* applied for by him, though he had verbally committed her to the care and custody of the respondent, until she should attain the age of twenty-one years. *The State, ex relatione Mayne, v. Baldwin*, 454

## HEIRS AND DEVISEES.

1. In October, 1837, D. S. being then seized of a farm on which he lived, and of no other real estate, made his will, by which he directed his executor to pay the debts out of his personal estate, and in defect thereof, to sell so much of the real estate as to pay the debts; and from and after the payment thereof, and subject thereto, that the residue of the personal estate be divided between his widow and his nephew D. D.; and the rents and profits of his real estate be distributed to them during their lives; and that on their deaths, respectively, their respective shares of such rents and profits to go to H. C. during his life; and that on his death, all the said real estate should go to the children of the said H. C. In April, 1839, D. S. bought another farm, and paid \$2000 of the purchase money, and for the balance, gave a mortgage on the farm so bought; and afterwards, to discharge that mortgage, borrowed money on his own bonds, some of which existed as debts against his estate after his death. D. S. died in October, 1841, without having altered or republished his will; and the farm purchased by him after making his will descended to a brother and nephews and nieces,

his heirs-at-law. *Held* that the descended land was chargeable with the debts before the land devised. *Stires v. Stires*, 224

2. A decree against executors, in a suit against them is no evidence, in a subsequent suit against the heirs and devisees, of the existence of the debt. *The Adm'rs of Hasen v. The Heirs and Devisees of Tillman*, 363

## HUSBAND AND WIFE.

1. If there be ground for apprehension on the part of the wife, that her husband will not make a proper defence for her, leave will be granted to her to answer separately from her husband. *Robbins v. Abrahams and Wife*, 51

2. A husband bought real estate, and directed the deed therefor to be made to another in trust for his wife and her heirs, so that the same should not be subject to his control or debts; and on the further trust to convey the same to such person or persons, for such uses, and subject to such provisions, limitations, and agreements as the wife, by writing under seal or will, should give, limit, or appoint. The trustee and the wife afterwards executed a mortgage to secure a debt due from the husband, and the mortgage was duly acknowledged by the wife. *Held* that the mortgage was good. *Robbins v. Abrahams*, 465

3. The depositions of the husband, offered on the part of the defendant, was held to be inadmissible. *Id.*

4. P. gave a mortgage to M., and afterwards married one of M.'s two daughters and only children. M. died intestate, leaving a widow and the said two daughters. The widow died shortly after. After the death of M. and the widow, H. married the other daughter, and she died without issue. H. then administered on M.'s personal estate, and filed a bill of foreclosure on the mortgage. *Held* that H., by administering on the estate of his deceased wife, became entitled to her share of the amount due on the mortgage, without liability to account; but that no more of the mortgaged premises

should be decreed to be sold than enough to pay the share of H.'s deceased wife. *Adm'rs of Moore v. Adm'rs of Poland*, 517

8. Though there be no express evidence of the delivery of an ante-nuptial agreement, and though it was in the possession of the husband after the marriage, its delivery will be presumed if its due execution be proved and it appear that it was recognized by the husband. *Ex'rs of Moore v. Smith*, 649

*Vide* ALIMONY, 1, 2.

SPECIFIC PERFORMANCE, 10.

TRUST AND TRUSTEE, 8.

COSTS, 1.

## I.

## INFANT.

*Vide* HABEAS CORPUS, 1.

## INJUNCTION.

1. On the positive denial of the allegations of the bill on which the complainant rests his equity, an injunction will be dissolved *Hatch v. Daniels*, 14; *Washer v. Brown*, 81
2. On bill for the specific performance of an alleged agreement for the sale of land to the complainant, an injunction was issued to restrain a subsequent purchaser from proceeding in an ejectment to recover possession from the complainant. The injunction may be dissolved on the answer of the defendant who is alleged to have made the agreement to sell, denying the agreement, and the answer of the subsequent purchaser, denying any knowledge, information, or belief of such alleged agreement *Rockwell v. Lawrence*, 20
3. If, on examining the complainant's claim of title to timber land, from which the defendant has been restrained from cutting timber, the court is clearly satisfied that the complainant has no title, the injunction will not be retained, though an action of trespass for cutting be pending at law, but will be dissolved. *Westcott v. Gifford*, 24
4. In general, an injunction will not be dissolved unless all the defendants implicated in the charge have answered. *Smith v. Loomis*, 60
5. A, who was keeping a tavern, and occupying a house and lands on one side of the road, and a small strip on the other side, on which were a well and stable used by him for the purpose of the tavern, agreed to sell the premises to B, knowing that B desired to purchase them for the purposes of keeping a tavern there, and represented to B that his title covered the strip on which was the well and stables. A did not own the strip. Under this representation B entered into articles of agreement for the purchase. An injunction was granted, staying the further prosecution of an action at law, brought by A against B for not complying with the articles, though the deed to A, which was referred to in the articles as containing a description of the premises, was on the table when the articles were drawn in the presence of B; the bill alleging that B, confiding in the representations of A, did not examine the deed. But on the coming in of the answer, positively denying the allegations on which the complainant's equity rested, the injunction was dissolved. *Washer v. Brown*, 81
6. The facts on which the equity of the bill rested, were not charged to be within the knowledge of the administrator. A motion to dissolve on his answer was denied. *Williams v. Adm'rs of Stevens*, 119
7. In 1813, "The Society for Establishing Useful Manufactures" sold a lot in Paterson, "together with the right of taking from their canal twelve inches square of water." A mill was shortly after erected on the lot, and water was drawn from the canal for supplying it, without the use of any means for accurately measuring the quantity drawn. In 1827, the society gave a notice to the owner of the mill that they had reason to believe he was taking more than the said quantity of water, and requesting him to confine his future use of water to that quantity. The owner of the mill, in answer to the notice, said he was not using more than the



- one foot of water. In December, 1843, a like notice was given and request made. The owner did nothing to limit the flow. In April, 1844, the society built a stone wall in their canal, opposite the head-race leading the water on the lot, and placed in the side of the wall a piece of cast iron, with an aperture in it of twelve inches square, for the flow of water into the head-race; and thereupon the owner of the mill prostrated the said wall. A motion for a preliminary injunction, restraining the owner from taking more water than will run through an aperture of twelve inches square, and from pulling down or taking out any gauge which the society might insert for the purpose of measuring twelve inches square of water, was denied. *The Society for Establishing Useful Manufactures v. Holsman*, 126
8. Preliminary injunction denied after great lapse of time. *Ib.*
9. A mortgagor, in 1829, conveyed a part of the mortgaged premises to C. The mortgagee, on the same day, released that part to C., and on the next day assigned the mortgage to D. On bill filed by D. in 1844, a decree was made for the sale of all the land described in the mortgage. C. was made a party defendant with the mortgagor, but did not appear, knowing that D. had notice of the release. At the sheriff's sale, all the land described in the mortgage was set up and struck off to D.; and the sheriff, in pursuance of an arrangement between D. and E., made the deed to E. E. brought ejectment against C. for the part so conveyed and released to him. On a bill filed by C. against E. stating these facts, and that D., when he took the assignment of the mortgage had notice of the release, a preliminary injunction was granted, restraining E. from prosecuting the ejectment. *Pierson and Gruet v. Ryerson*, 196
10. A denial on information and belief of notice to another is not sufficient to dissolve an injunction. *Ib.*
11. The Society for Establishing Useful Manufactures, established in 1791, located at the falls of the Passaic, and owning mill sites there, on the 18th of August, 1845, pulled down a gate and waste way of "The Morris Canal and Banking Company," incorporated in 1824, and discharged the water from the canal into the Passaic above the falls. The canal company repaired the breach, and filed their bill against the society for an injunction, which was granted. The society answered the bill, and set up an agreement under seal, entered into between the canal company and them, in 1836, for the discharge of water from the canal into the stream above the falls, and stated that the canal company, in breach of the contract, had nailed down the gates of the waste way, and stopped the flow of water from the canal to the river; and thereupon it was moved to dissolve the injunction. The motion was denied. The society also filed a cross bill, praying a decree for the specific performance of the agreement, and that the canal company might, in the meantime, be restrained from preventing the flow of water from the canal to the stream, according to the provisions of the agreement, and moved for the injunction accordingly. This motion was denied. *The Morris Canal and Banking Company v. The Society for Establishing Useful Manufactures*, 203
12. A right claimed must be free from doubt, and the injury from a violation of it irreparable in damages, to authorize the court to interpose in aid of it by preliminary injunction. *Ib.*
13. A judgment creditor of a trustee restrained from selling his title and interest in the trust property by execution. *Campfield v. Johnson*, 245
14. J. C. mortgaged lands to C. C., and afterwards conveyed the lands to C. C. in trust to apply the rents and profits towards paying the mortgage and a certain note given by J. C. to P. S., until a sale could be made of the premises at a fair price, and then to sell the same, or any part thereof, to pay the mortgage and the note, and to pay the residue of the proceeds of the sale to J. C. C. C. went into possession of the lands. J. C. afterwards died intestate, leaving infant heirs. C. C. assigned the

mortgage to P. A. J., who filed his bill of foreclosure thereon. Pending the foreclosure suit, P. A. J. recovered judgment at law against C. C. on his personal liabilities, and caused executions to be levied on "all the right, title and interest" of C. C. in the premises so conveyed to him in trust. On bill filed by C. C., sale under the said levies was enjoined, and on motion to dissolve without answer, the injunction was retained.

*Ib.*

15. On motion, on bill and notice, for an injunction and the appointment of a receiver, the affidavit of the defendant may be read in opposition. *Kean v. Colt*, 365

16. To authorize an injunction and the appointment of a receiver, there must be a well-grounded apprehension of injury about to be done. *Ib.*

17. When the misconduct alleged in the bill occurred, if at all, several years before, and no act is threatened, or mischief impending, an injunction and receiver will not be ordered. *Ib.*

18. In 1822, the owner of a mill seat leased to the canal company, for three years, at an annual rent, the privilege of diverting water from the stream at a point above and beyond his land into the canal. He then sold his mill seat to a third person, reserving by the deed all right, interest and demand against the company for the use of the water which he then had, or which either of the parties to the deed might thereafter have, as fully as if he had not conveyed the mill seat. The company paid the grantor of the mill seat the rent for the three years. After the expiration of the lease, the company continued to use water diverted from the stream without paying for it. In 1845, the grantor filed a bill, praying an account and payment of the rents, and an injunction restraining the company from diverting the water. The injunction was denied. *Warne v. The Morris Canal and Banking Company*, 410

19. When there is a remedy at law, and nothing to show that the damages which might be awarded at

law could not be realized, and nothing of the character of irreparable damage, an injunction will not be granted. *Ib.*

*Vide* APPEAL, 1, 2, 3, 4.

TIMBER, 1, 2, 3.

CORPORATIONS, 2.

APPEAL, 6.

PARTNERSHIP, 1, 3.

PARTITION, 1, 4.

## J.

### JUDGMENT.

Relief from a judgment against a surety granted on the discovery of a receipt given to the deceased principal.

*Vide* RECEIPT, 2.

## L.

### LAND.

1. An authority to another to execute for the owner, and in his absence, a deed for land, must be by deed. *Tappan v. Redfield*, 339

2. When not chargeable with legacies.

*Vide* EXECUTORS AND ADMINISTRATORS.

WILL, 4.

### LAPSE OF TIME.

1. A mortgage will be presumed paid if the mortgagee never entered, and there has been no foreclosure nor payment of interest within twenty years. *Ex'rs of Cavalier v. Huffman*, 354

2. *Semble*. Insolvency of the mortgagor is not sufficient to overcome the presumption *Ib.*

3. Would the absence of the mortgagor from the state for a portion of the twenty years defeat the presumption of payment? It seems not. *Ib.*

4. Where a bill for the recovery of a legacy, bequeathed to a married woman, was filed thirty-one years after the death of the testator, twenty-one years after the settlement of the estate, and seventeen

years after the death of the executor, and no cause shown for the delay, the bill was dismissed on the ground of the presumption of payment arising from the time which had passed after the right of action accrued before suit brought. *Peacock v. Black*, 535

*Vide* INJUNCTION, 7, 8.

ABSENCE, 1,  
EXECUTORS AND ADMINISTRATORS, 6, 7.

## LEASE.

*Vide* PARTNERSHIP, 2.

## LEGACY.

- 1 The will directs, in substance, that \$1500 be put at interest by the executors, and the interest be added to the principal from time to time, or the interest put at interest; and that one-half of the said sum, and of the interest which may have accrued when M. L. C. attains twenty-one, be paid to her, and that the other half be paid to J. C. when he attains twenty-one; and that if either die under age, leaving issue, his share be paid to his children; and if either die under twenty-one without leaving issue, the will gives the whole of said share and interest to the other, or to the children which the other, if dead, may have left. *Held*, that on the death of one under twenty-one leaving issue, the issue are entitled to receive the half; and further, that the time of payment in that event is not postponed to the time at which the deceased parent would have attained twenty-one if he had lived. *Ware v. Ex'rs of Cook*, 193
2. The administratrix of an executor held liable to a legatee under the will of which her intestate was executor, for the proceeds of bank stock belonging to the first estate, which was transferred by the executor to himself in his own name, and which came to the hands of, and was sold by his administratrix. *Tucker v. Adm'x of Green, who was Ex'r of Green*, 380
3. E. G. died in 1827, and by his will gave several pecuniary legacies, and

among them \$900 to his grandson E. G. S., a minor, to be kept at interest by the executor of the will until E. G. S. attained the age of twenty-one, and then to be paid to him, with the interest that should have accrued thereon. And for the purpose of carrying his will into effect, and paying the debts and legacies, authorized the executor to sell so much of the real estate as might be necessary. He then gave all the rest of his estate, real and personal, to his son, J. D. G., whom he appointed executor. The legacies amounted to \$3000. The personal estate of E. G. was appraised at \$3071.23, including thirty-six shares of Trenton Bank stock, appraised at \$1260. In 1829, J. D. G., as executor of the will of E. G., transferred to himself, in his own name, the thirty-six shares of stock, and they stood in his own name at his death, in 1830. No administration *de bonis non* with the will of E. G. annexed was ever granted. Administration of the personal estate of J. D. G. was committed to his widow, F. G. In 1836, she sold the bank stock for \$1360, and, as administratrix of J. D. G., transferred it to the purchaser. On bill by E. G. S. against the administratrix of J. D. G., for the payment of the legacy, it was decreed for the complainant. 16

*Vide* EXECUTORS AND ADMINISTRATORS, 1, 2, 3, 4, 8.  
LAPSE OF TIME, 4.  
WILL, 4.

## LIEN (OF MECHANICS.)

1. Construction of the mechanics' lien law. *Ex'rs of Vandyne v. Vanness*, 485
2. A carpenter finished a dwelling-house on a tract of land on the 17th of November, 1842, and filed his claim in the office of the clerk of the county on the 17th of January, 1843. On the 22d of December, 1842, the owner of the land, then in possession of the house, mortgaged it to a person having no actual knowledge of the carpenters' lien. *Held* that the carpenters' lien was prior to that of the mortgage. 16.



3. It was held that the carpenters' lien was not confined to the house and the ground it covered, but extended to so much of the tract of land on which the house was built as, with the house, would be required to discharge it. *Ib.*

## LOSS (OF RECEIPT.)

*Vide* EVIDENCE, 4.

## LUNACY.

1. A guardianship in lunacy may be superseded on its being made to appear that he who has been found lunatic is restored to sanity. *Matter of Rogers*, 46
2. The usual course is to refer it to a master to take proofs as to the state of mind of the petitioner, and to report the proofs and his opinion thereon. But though the master reports the proofs and his opinion thereon that the petitioner is restored, the Chancellor, in his discretion, may direct the petitioner to appear before him for inspection and examination. *Ib.*
3. The Chancellor, in his discretion, may discharge the guardianship on the ground of restored sanity, or direct an issue to try the question. *Ib.*

## M.

### ;'MISTAKE.

Relief granted when by mistake of both seller and buyer, the deed did not cover the land intended to be sold and bought; and money paid on account of the purchase decreed to be repaid, and the bond and mortgage given by the purchaser to be canceled. *Blair v. M'Donnell*, 327

## MORTGAGE.

### I. Of the Mortgage Generally.

1. A mortgage was given by A, living in this state, to B, of New York, on lands in this state, to secure the

payment of a bond. The mortgagor afterwards, for purposes of his own, executed and caused to be recorded, in the proper office in this state, a deed of the premises to the mortgagee. The mortgagee, without having assented to the deed, assigned the bond and mortgage, with all his other property, for the benefit of all his creditors. Afterwards, a creditor of the mortgagee attached the land. *Held* that the attachment did not hold the property against the mortgage. *Longstreet v. Shipman*, 43

2. If a mortgagor, subsequently to the mortgage, sells and conveys a part of the mortgaged premises, an equity arises in favor of the purchaser to have the part which remains in the mortgagor first sold for or towards the payment of the mortgage. *Engle v. Haines*, 186
3. But if the purchaser agrees with the mortgagor that the part he buys shall be subject to the mortgage, and that the amount due on the mortgage shall be a part of the consideration he is to pay, equity will not interpose to subject the part of the mortgaged premises remaining in the mortgagor to be first sold. *Ib.*
4. And a subsequent grantee of such purchaser from the mortgagor with notice has no better equity against the mortgage. *Ib.*
5. A mortgagee in possession personally, is chargeable with reasonable rent, and a subsequent mortgagee is entitled to the aid of the court in having such rent ascertained and applied in reduction of the prior mortgage. *Moore v. Degraw*, 346
6. Decree opened, under the circumstances, after enrollment, and on motion, on application of a subsequent mortgagee, for the purpose of charging the complainant, to whom a prior mortgage had been assigned when he was tenant of the premises under the mortgagor, and who filed a bill to foreclose the prior mortgage, and remained in possession in the meantime with reasonable rent. *Ib.*

### II. Priority of Mortgages.

1. A sold a tract of land to B for \$9000; \$4000 to be paid on the de-

livery of the deed, and the balance of the consideration money to be secured by a mortgage on the premises. Before the deed was executed, it was agreed between the seller and purchaser and C, that if C would lend the purchaser \$2000, to enable him to make the cash payment of \$4000, a first mortgage should be executed by the purchaser to C for the \$2000 to be loaned by him, and that the mortgage to C should be first recorded. C loaned the \$2000, and the deed and mortgages were made accordingly, and the mortgage to C was first recorded. Afterwards, A assigned his mortgage to the complainant. *Held* that C's mortgage was the first encumbrance. *Lovett v. Demarest*, 113

2. A certificate of the clerk of the county, setting forth that the mortgage to A was the first and only mortgage on record, shown by A to the complainant when he took the assignment of the mortgage, will not have the effect of giving priority to the mortgage assigned to the complainant. *Ib.*
3. Between two mortgagees, neither having notice of the other's mortgage, the mortgage first recorded has preference, though the other was first executed and had been foreclosed, and the holder of it had bought the mortgaged premises at the sale under the decree in the foreclosure suit; the holder of the mortgage first recorded not having been made a party in that suit. *Taylor v. Thomas*, 331
4. On a bill by the holder of a mortgage last given but first recorded, denying notice of a mortgage prior in date, and answer averring notice and replication, the cause being brought to hearing on bill, answer and replication, it was decreed for the complainant. *Ib.*

## N.

## NOTICE.

*Vide* CORPORATIONS, 8, 9, 10.  
MORTGAGE, 4, 5, 6, 7, 8.  
INJUNCTION, 9.  
PLEADINGS—ANSWER, 9.

## O.

## ORDINARY.

*Vide* APPEAL, 9

## P.

## PARENT AND CHILD.

*Vide* HABEAS CORPUS, 1.

## PARTIES.

*Vide* PLEADINGS, I.

## PARTITION.

1. On bill for partition, injunction granted restraining the party in possession from committing waste by cutting timber. *Obert v. Obert*, 397
2. If the title of the complainant in a bill for partition is denied, the court may retain the bill to give him an opportunity to try his title at law. *Ib.*
3. An equitable partition may be made so as to assign a portion of the land on which improvements have been made to him who made them; and if he has cut off the timber from a part of the land adjoining the part improved, the court may direct that the land from which the timber has been cut, be valued as it was with the timber on it and included in the assignment to him. *Ib.*
4. In special cases, one tenant in common may, on the application of the other, be enjoined from committing waste, but the jurisdiction is sparingly exercised. *Ib.*
5. On bill for partition by a tenant in common owning a twentieth part, an injunction was granted against the tenant in common in possession, restraining him from cutting timber. His answer showed that he was owner of eight-twentieths; that he made improvements to the amount of \$2000; and that he only intended to cut the wood and timber from two acres near the barn, which he had

commenced doing when the injunction was served, and he denied all intention to commit waste. The injunction was dissolved. *Ib.*

*Vide* SPECIFIC PERFORMANCE, 4, 5, 6.  
TRUST AND TRUSTEE, 7.

## PARTNERSHIP.

1. One of two partners, being about to leave the state for his health, assigned to the other partner a bond and mortgage he held against a third person. He died while absent. The administrator of his personal estate sued the surviving partner for the amount of the bond and mortgage. On a sworn bill filed by the surviving partner, stating that the deceased partner, when he left, was indebted to the partnership in more than the amount of the bond and mortgage, and that it was agreed between them that they should be applied to the purposes of the partnership, (stating how,) and that he had so applied them, the administrator was enjoined from proceeding in the suit. *Williams v. Adm'r of Stevens*, 119
2. In 1832, G. and B., partners, leased a building and water-power, and put machinery into the building, for the purpose of carrying on their partnership business. In 1834, G. gave a mortgage on his interest in the mill and machinery, as security for his individual debt. A bill was filed in July, 1840, for the foreclosure of the mortgage and the sale of G.'s interest. The lessor was made a defendant. The partnership continued in the possession and use of the mill and machinery. At the time of the filing of the bill, and at the hearing of the cause, there was rent due from the partnership to the lessor. *Held* that the mortgagee was not entitled to G.'s interest in the machinery free from the rent, but that the interest which could be decreed to be sold under the mortgage was only what G. would be entitled to after paying the debts of the partnership, including the rent. *The Receivers of the Mechanics' Bank v. Godwin*, 334
3. R. and B. were partners in two establishments, one for the tailoring

business, and the other for merchandizing. They dissolved, and submitted the matters in difference between them to arbitration, and entered into mutual submission bonds, with sureties. The arbitrators awarded that R. should pay the debts of the tailoring business and pay B. \$468.10, and that B. should pay the debts of the merchandizing business, in full of all demands by either against the other. After the award, two executions on judgments recovered against R. and B. for debts growing out of the merchandizing business were levied on the goods and lands of R. and B. respectively. R. obtained an injunction against selling his lands before the lands of B. It appeared by the answer that R. had not paid to B. the \$468.10. On motion to dissolve the injunction, an order was made that R. pay the \$468.10 on the execution within thirty days, or that the injunction be dissolved. *Runyon v. Brokaw*, 340

4. A and B, partners, dissolved partnership, and by the articles of dissolution, A took the property of the partnership, and agreed to pay the debts of the partnership, and to relieve B therefrom, and to pay B the balance due him of the capital invested by him, and the further sum of \$1600 for his share of the stock and profits of the partnership. After the dissolution, a creditor of the partnership obtained a judgment against A and B for a partnership debt, for \$607.91, and issued execution thereon, which was levied on the personal and real estate of both A and B. A's personal property, so levied on, consisting of store goods and other personal property, was afterwards assigned to C, the father-in-law of A. A afterwards sold to D the stock of goods he then had on hand, and C thereupon, by writing under seal, released to D all his interest in the goods under and by virtue of the said execution, with full notice of the terms of the dissolution. *Held* that the judgment could not be enforced against B. *Adm'r of Bell v. Hall*, 477

## PAYMENT.

*Vide* LAPSE OF TIME, 1, 2, 3.



## PERFORMANCE.

*Vide* SPECIFIC PERFORMANCE.

## PLEADINGS.

- I. Parties.*
- II. Bill.*
- III. Answer.*
- IV. Replication.*

*I. Parties.*

1. *Semble.* On a bill filed by a receiver for the creditors and stockholders of a corporation, it is not necessary to make the creditors and stockholders parties. *Mann v. Bruce*, 413
2. On a bill filed by a creditor of a testator by bond signed by the testator and a surety, to set aside a sale of lands made by the executor and devisee, and to subject the land to the payment of the bond debt, held that the surety was not a necessary party to the suit. *Ex'rs of Cooper v. Cooper*, 498

*Vide* SPECIFIC PERFORMANCE, 4, 5, 6. MORTGAGE, 7.*II. Bill.*

3. A recovery will not be allowed on a case proved if it differ essentially from the case made by the bill. *Hopper v. Sisco*, 343
4. H. filed a bill against the devisees and executors of S., deceased, for the foreclosure of a mortgage given by S., in his lifetime, to H.; in the ordinary form, to secure a bond conditioned for the payment of \$1200. The defendants set up in their answer that the bond and mortgage were given as collateral security for certain judgments recovered by different persons against S. which had been assigned to H., and that the said judgments, after the giving of the bond and mortgage, were satisfied by sales on execution of other property of S. Proofs were taken by the defendants in support of the defence. H. then proved and exhibited several receipts for moneys paid by him for S. subsequent to the bond and mortgage, on executions on judgments of

different persons against S., two of which judgments were assigned to H., and a receipt from the holder of a due-bill given by S. acknowledging the payment thereof by H., in all amounting to \$301.04. Held that under the pleadings a decree for sale to raise these sums could not be made. 1*b.*

5. Parties are confined to the case made by the pleadings, and evidence to facts not put in issue cannot be read. *Ex'rs of Cavalier v. Huffman*, 354
6. The court cannot act on a distinct ground for relief made by the proof, if it be not set up in the bill. *Plume v. Small*, 460

*III. Answer.*

7. The substance of a charge must be admitted or denied. A mere literal answer is insufficient. *Smith v. Loomis*, 60
8. Where a matter is charged in the bill which must, if true, be within the knowledge of the defendant, the substance of the charge should be answered directly, not evasively nor by way of negative pregnant. 1*b.*
9. When the circumstances charged are suspicious, or have the appearance of collusion or fraud, a defendant will be held to strict rule in answering. 1*b.*
10. In general, an injunction will not be dissolved unless all the defendants implicated in the charge have answered. 1*b.*
11. Every allegation of the answer which is not directly responsive, but sets forth matter in avoidance or bar, is denied by the general replication and must be proved *aliunde*. *Lovett v. Demarest*, 113
12. The facts on which the equity of the bill rested were not charged to be within the knowledge of the administrator. A motion to dissolve on his answer was denied. Insufficiency of answer in other respects. *Williams v. Adm'r of Stephens*, 119
13. A denial on information and belief of notice to another is not sufficient

- to dissolve an injunction. *Pierson and Gruet v. Ryerson*, 196
14. The denial of two allegations conjunctively is not a denial of each. *Ib.*
15. A release of a part of mortgaged premises had been recorded. An allegation of the defendant that he never heard of the release till after he bought, *held*, under the circumstances, not to be a sufficient denial of knowledge of the release. *Ib.*
16. A defence not raised by the pleadings cannot be raised by proofs. *Mann v. Bruce*, 413
17. The denial in the answer, of the material allegation of the bill, which denial is supported by a witness for the defendant, cannot be overcome by a single witness, in support of the allegation of the bill, though there be discrepancies in other matters between the answer and the witness for the defendant. *The Commercial Bank of New Jersey v. Reckless*, 430
18. The uncorroborated testimony of a single witness is not sufficient to overcome the denial of an answer. *Ib.*, 650
19. An answer may contain within itself such circumstances as will alone suffice to deprive it of all efficacy. *Per Chief Justice Green*, *Ib.*
3. Leave to file a plea after demurrer overruled will not be granted if it is manifest that the plea offered, if true in fact, would be no bar to the relief sought by the bill. *Seely v. Price*, 231
4. Decree opened, under the circumstances, after enrollment, and on motion, on application of a subsequent mortgagee, for the purpose of charging the complainant, to whom a prior mortgage had been assigned when he was tenant of the premises under the mortgagor, and who filed a bill to foreclose the prior mortgage and remained in possession in the meantime, with reasonable rent. *Moore v. Degraw*, 346

#### IV. Replication, (Effect of.)

*Vide* MORTGAGE—PRIORITY, 4.  
ANSWER, 5.  
ABSENCE, 1.

#### POWER.

*Vide* LAND, 1.

#### PRACTICE.

1. The joint and several answers of a married woman and her trustee, to a bill against her trustee, her husband, and herself, put in without leave of the court, may be suppressed for irregularity. *Robbins v. Abrahams*, 16
2. The complainant filed his bill for his proportion of the interest of a surplus in the hands of an executor, and made his brothers and sisters, who were entitled to equal portions of the interest, (if the complainant's claim for interest is good,) defendants. They answered the bill, submitting their rights to the protection and judgment of the court. Pending the suit, the person at whose death the principal was to be distributed among the complainant and his brothers and sisters died, and thereupon the complainant settled with the executor. No decree had been made in the cause. The complainant was permitted to discontinue the suit. *Bullock v. Zitley*, 77
3. A father had recovered a judgment against one of his sons, and caused an execution to be issued thereon, and put into the hands of the sheriff

*Vide* AMENDMENT, 1, 2, 3  
HUSBAND AND WIFE, 1.  
APPEAL, 1, 2, 3, 4.  
INJUNCTION, 15.

#### PREROGATIVE COURT.

1. Motion to vacate an order of the Ordinary vacating an order to prosecute an administrator's bond denied, the Supreme Court having acted on the vacating order and dismissed the suit on the bond. *Matter of Webster's Administration Bond*, 89
2. By whom application may be made to the Ordinary for leave to prosecute an administration bond. *Ib.*
3. A father had recovered a judgment against one of his sons, and caused an execution to be issued thereon, and put into the hands of the sheriff

riff. After the son's death, the father signed a writing at the foot of the execution in these words: "I hereby discharge J. W. Caldwell, sheriff, &c., from all liability whatever of the above-stated execution, the defendant being dead and no further proceedings required on the same." The father afterwards died intestate, and there was a balance of his personal estate for distribution, of about \$14,000, exclusive of the amount of the said judgment. The deceased son left three children, and six children of the intestate father survived him. *Held* that the said writing given by the sheriff did not discharge the debt so as to entitle the children of the deceased son to an equal seventh of the said balance, but that the amount of the debt should have been added to the said balance, and one-seventh of the whole sum decreed to each of the six surviving children; and that the amount of the debt should constitute so much of the seventh to be distributed to and among the children of the deceased son. *Batton v. Allen*, 99

est and be equally divided among his seven daughters, share and share alike, and paid to them when they should respectively attain to the age of eighteen years; and devised his homestead farm to his son when he should attain the age of twenty-one years; and directed that in case his son should die without issue before he attained the age of twenty-one, the said homestead should be sold, at the discretion of his executors or the survivor of them, and the proceeds thereof be placed at interest, and divided among his surviving children, share and share alike, and paid in the manner before directed, and appointed the widow and another executors. *Held* that on a sale of the Read farm by the widow as surviving executor, before the youngest daughter attained the age of eighteen, each daughter then under eighteen was entitled to her respective share of the proceeds immediately. *Anderson v. Henderson*, 106

*Vide* WILL, 8.

4. A note given by a son to his father is not, of itself, evidence of an advancement by the father. *Ib.*

## PRESUMPTION.

*Vide* ABSENCE, 1.

5. Proof of mere parol declarations of a father that he had fully advanced a child is not sufficient to establish an advancement. *Ib.*

## PROBATE.

*Vide* WILL, 3.

6. The testator gave to his wife the use and interest of all his personal estate during her widowhood, and also the use and possession of all his real estate during her widowhood and as in his will after directed and limited, in lieu of dower; and directed that on the death or marriage of his widow before his youngest daughter attained the age of eighteen years, the surviving executor should sell the personal property bequeathed to the widow and place the proceeds at interest, and directed his Read farm to be sold when his youngest daughter attained the age of eighteen, or sooner if his executors or the survivor of them should think it most for the benefit of the estate; and that whenever the sale of the real and personal estate thus directed to be sold should be made, the same should be placed at inter-

## PURCHASER.

*Vide* VENDOR AND PURCHASER.

## R.

## RECEIPT.

1. What proof held satisfactory of the existence, genuineness and loss of a receipt from a deceased person. *Williamson v. Adm'rs of Johnson*, 537
2. On the discovery, after judgment against a surety, of a receipt dated in 1792, of which the surety had heard before the judgment was obtained, but which could not then be found, on bill filed by the surety in 1824, after the judgment had been paid, it was decreed that the plain-



tiff in the judgment at law repay to the surety the excess of the judgment over what it should have been after deducting the amount of the receipt with interest thereon from the date thereof, with interest on such excess from the date of the judgment. *Ib.*

### RECEIVER.

*Vide* INJUNCTION, 15, 16, 17.  
APPEAL, 6.

### REFUNDING BOND.

*Vide* EXECUTORS AND ADMINISTRATORS, 4.

### REGISTRY.

*Vide* MORTGAGE, 3.

### RENT.

*Vide* PARTNERSHIP, 2.  
MORTGAGE, 9.

### S.

### SALE.

1. Sheriff's sale declared void by reason of fraudulent combination to prevent competition and the consequent sacrifice of the property. *The Ham-burgh Manufacturing Company v. Edsall*, 249
2. On a sale of land by a fiduciary, he cannot buy either directly or through another. *Winter v. Geroe*, 319
3. Proofs on which it was determined that one to whom land was struck off at an executors' sale bought for the executors. *Ib.*

*Vide* VENDOR AND VENDEE, 2.  
EXECUTORS AND ADMINISTRATORS, 5.

### SEAL.

*Vide* CORPORATIONS, 1, 5.

### SET-OFF.

A having recovered a judgment at law against B, and issued execution, which was returned "no goods or land," filed a creditor's bill against B, which after answer was dismissed with costs. *Held* that the judgment at law could not be set off against the costs of B in his defence against the creditor's bill. *Brisley v. Jones*, 512

### SHERIEF'S SALE.

*Vide* SALE, 1.

### SPECIFIC PERFORMANCE.

1. Courts of equity will not, in general, decree performance of contracts for the sale of personal property, but will decree the execution of trusts of personalty. *Kimball v. Morton*, 26
2. Stock in a bank had been transferred to the defendant to be by him transferred in different portions, one portion of which was to be transferred to the complainants. A transfer was decreed. *Ib.*
3. A and B entered into an agreement that A should furnish 2700 peach trees at his expense, and that B should plant and cultivate them on his farm, at his expense, and should pick and market the fruit during the life of the trees at the joint expense of the parties, and account to A for half the net proceeds of the sales. The trees were furnished, and planted and cultivated accordingly. A died, and the administrators of his estate sold his interest to D. *Held* that D could come into this court for the performance of the agreement, and for an account and payment of half the net proceeds of the sales. *M'Knight v. Robbins*, 229, 642
4. By writing under seal executed by heirs-at-law, it was agreed that P., one of them, should have the outlots for his share, and that the others should take for their shares the homestead farm, and that P. would execute to the other three, separately, releases for the shares which the three might agree that each of them

should have in the homestead, when a certain mortgage given by the intestate on one of the out-lots should be discharged, and that as soon as P. should execute such releases, the others should execute releases to him for the share which it was thereby agreed he should have. P. took possession of the share assigned to him by the agreement. Afterwards, by an agreement between the three, a certain part of the homestead was assigned to M., one of the three, and the other two released the same to her, and M. released to the other two all her interest in the residue of the homestead. Previous to the agreement among the four, H., one of the heirs, had given a mortgage on his undivided interest in the whole real estate. M. filed a bill against P. for the specific performance of the agreement on his part to release to her the share so assigned to her, tendering a release of her interest in his share. Neither of the said mortgages was paid at the time of the filing of the bill, but the mortgage given by the intestate was paid before the hearing of the cause, and the mortgage given by H. on his undivided interest in the estate had been foreclosed and his interest sold, and the complainant produced at the hearing an agreement by the purchaser to abide by the agreement for partition and to execute releases under it. *Held* that performance of an agreement to execute a release of real estate may be decreed, and that performance may be decreed if the party asking it is able and willing, at any time before the decree, to perform his part of the contract. It was referred to a master to ascertain whether the complainant was able to procure a release to P. from the present owner of H.'s share and from the remaining heirs. *Soper v. Kipp*, 383

5. Specific performance of an agreement among heirs for partition cannot be resisted on the ground that the defendant, in taking the part assigned to him, contemplated the sale of it, and that by reason of mortgages existing at the time of the agreement he was unable to sell the part assigned to him, he knowing of the mortgages at the time of the agreement, and one of them, given by the intestate, being paid

before the hearing, and the other, given by one of the heirs on his undivided interest in the whole estate, having been foreclosed and such interest sold, and the complainant proffering a release from the purchaser of all his interest in the share of the defendant. *Ib.*

6. *Held*, that under the circumstances, the other heirs were not necessary parties to the suit. *Ib.*

7. On a bill by a vendee for the specific performance of an agreement for the sale of lands, if the vendee has performed a valuable part of the contract, and is in no default as to the performance of the residue, performance will be decreed. *Hulmes v. Thorpe*, 415

8. A slight variation or default on the part of the vendee in the performance of work to be done by him before the deed was to be delivered, will not prevent a decree for specific performance if the difference is a proper subject for compensation in money. *Ib.*

9. In decreeing performance, the court may give a day and prescribe equitable conditions. *Ib.*

10. *Semble*. That, as a general rule, the court will not make a decree that a husband who has contracted to sell lands shall procure his wife's execution and acknowledgment of the deed. *Ib.*

11. By agreement under seal, J. A. covenanted to sell to G. V. a tract of land, and to make to G. V. a warrantee deed therefor, possession to be given on the 1st of April then next; and G. V., for and in consideration of the said tract of land, covenanted to pay J. A. \$1850, \$200 on the 1st of April then next, \$400 in one year thereafter, and the balance in installments of \$200 a year, all with interest, until all should be paid. On the day fixed for the first payment, G. V. tendered \$200 and demanded the deed and possession. J. A. refused to give the deed unless G. V. would execute to him a mortgage on the premises to secure the subsequent payments. On bill filed by G. V. for the specific performance of the agreement, the relief sought

was denied. *Van Scooten v. Albright*, 467

*Vide* INJUNCTION, 2.

T.

TENANT.

*Vide* MORTGAGE, 9.

TENANTS IN COMMON.

*Vide* PARTITION, 3, 4, 5.

TIMBER.

1. When there is no charge in the bill that a tract of timber land from which the defendant is enjoined from cutting belongs to the estate of which the complainants are devisees, and the answer denies that the timber belongs to the estate and avers that it belongs to the defendant, the injunction will be dissolved. *Cooper v. Cooper*, 9
2. A large tract of pine land owned in connection with a glass factory, for the ordinary uses of which the owners from time to time cut wood from the pine land, was mortgaged. After the giving of the mortgage, a fire swept over a large portion of the tract, killing the timber standing on it. The mortgagors commenced cutting down the burnt timber, proposing to cut it all down, alleging that it was necessary to do so as well to save the wood from rotting, as for the permanent benefit of the estate in reference to the new growth. The mortgagees filed a bill and obtained an injunction against the cutting. The bill did not pray a foreclosure, the whole money not having become payable. On answer, stating the facts as to the business and the propriety of felling the burnt timber, and offering to give other security for an amount equal to the value of the burnt wood which the mortgagors proposed to cut, a reference was ordered to ascertain such value, with a view of directing such security to be given. *Brick v. Getsinger*, 391
3. *Semble*. If a large portion in value of pine woodland mortgaged be burnt over, and it be proper to save the burnt wood from rotting

and for the permanent benefit of the estate in reference to the new growth, that the burnt wood be cut off, the land being worth little without wood on it, it would be right that the burnt wood so cut should be applied towards paying the mortgage. *Ib.*

*Vide* INJUNCTION, 3.

TITLE.

*Vide* PARTITION, 3.

TRESPASS.

*Vide* INJUNCTION, 3.

TRUST AND TRUSTEE.

1. A general charge of abuse of trust is not sufficient ground for the interposition of the court to restrain an executor or other trustee from further interfering with the estate. Facts showing such abuse should be made to appear. What facts not sufficient. *Cooper v. Cooper*, 9
2. When the legal and equitable estates are united in the same person, the equitable estate is merged in the legal. *Ib.*
3. A trustee for the use of his children of a tract of land called the Abbot tract made his will, by which, after giving particular parts of his real estate to his children respectively, he directs his executors to sell some of his lands, expressly excepting the Abbot tract from the power to sell, and then divides all the residue of his estate, real and personal, to his children. On the death of the testator, the legal estate in the Abbot tract vested in his children, the *cestuis que trust*. *Ib.*
4. Courts of equity will decree the execution of trusts of personalty, though they will not in general decree performance of contracts for the sale of personal property. *Kimball v. Morton*, 26
5. Stock in a bank had been transferred to the defendant, to be by him transferred in different portions, one



- portion of which was to be transferred to the complainants. A transfer was decreed. *Ib.*
6. The statute of frauds, requiring declarations of trust to be in writing, does not extend to trusts of personality. *Ib.*
7. A and B held a mortgage given to them as trustees on the undivided half of a mill-seat. B, in his own right, held a subsequent mortgage on the same half. On proceedings for partition between the owners of the mill-seat, it was ordered to be sold at auction, and was so sold by the commissioners. The order for sale and the conditions of sale were silent as to whether the property was to be sold subject to or free from encumbrance. *Held* that parol proof was admissible to show that B was present at the sale, and agreed that the property should be sold free from encumbrance, and received from the commissioners the mortgagor's half of the proceeds of the sale, knowing that the purchaser paid the money understanding that the property was sold free from encumbrance, and that the mortgages were to be canceled. B applied a part of the money he received to the payment of his, the junior, mortgage, in full, and the residue of it towards paying the mortgage of the trustees, thus leaving a balance due on that mortgage. The half of the proceeds of sale received by B was sufficient to pay the mortgage to the trustees, and part of the mortgage held by B in his own right. *Held* that the mortgage to the trustees was satisfied. *Rogers v. Rogers*, 32
8. A husband bought real estate, and directed the deed therefor to be made to another in trust for his wife and her heirs, so that the same should not be subject to his control or debts, and on the further trust to convey the same to such person or persons, for such uses, and subject to such provisions, limitations and agreements as the wife, by writing under seal or by will, should give, limit or appoint. The trustee and the wife afterwards executed a mortgage of the lands to secure a debt due from the husband, and the mortgage was duly acknowledged by the wife. *Held* that the mortgage was good. *Robbins v. Abrahams*, 465
9. A trustee who, from long continued intemperance, has become unfit to have the charge of the trust property, will be removed, and a new trustee will be appointed, *Bayles v. Staats*, 513
10. Several executions had been levied by a sheriff on the lands of "The Hamburg Company," of which the first in priority was in favor of E. The same sheriff had in his hands at the same time an execution issued on a decree in chancery on the first mortgage, for the sale of the mine farm of "The Clinton Manufacturing Company," and also an execution at law against the said Clinton company, by virtue of which he had levied on the said Clinton company's mine farm. E. held a subsequent mortgage on this Clinton mine farm. Prior to the sale by the sheriff, certain creditors of the Hamburg company, having no judgments, together with E. entered into an agreement in writing among themselves that L., one of them, should, as their trustee, buy the lands of both companies as a means of securing their debts against the Hamburg company, including E.'s judgment and other claims he had or made against the company and his mortgage on the Clinton mine farm. There was also an understanding with P., who held the bulk of the stock of both companies, and was carrying on, or conducting the business of the Hamburg company, that the said trustee should convey both properties to him on his payment of the debts of the said agreeing Hamburg creditors, and the sums for which the properties should be struck off to the said trustee. The properties were sold by the sheriff and bought by the said L., the other judgment creditors of the Hamburg company not being present at the sale. The sheriff's deed to L. was absolute. On a bill filed by the Hamburg company and P., it was held that L. was a trustee for the Hamburg company and its creditors both of the Hamburg property and of the Clinton Company's. *Edsall v. The Hamburg Manufacturing Company*, 658

Vide PRACTICE, I.

EXECUTORS AND ADMINISTRATORS, 6.

Vide SALE, 2, 3.  
INJUNCTION, 14.  
FRAUD, 1.

## U.

## USURY.

1. A, living in New York, sells to B, also living in New York, a tract of land in New Jersey, and takes his bond for part of the consideration money with seven per cent. interest, and his mortgage on the lands conveyed, to secure the payment of the bond. The mortgage is not usurious. *Cotheal v. Rydenburgh*, 17, 631
2. The exchange of the papers in New Jersey at the proper record office will not make the mortgage usurious, they having been executed and acknowledged in New York, and a sufficient reason for not exchanging them there being shown. *Ib.*

## V.

## VENDOR AND PURCHASER.

1. *Semble.* That a purchaser for full value is entitled to have an encumbrance removed by the application to that purpose of a sufficient portion of the purchase money. *Washer v. Brown*, 81
2. The conditions of sale for the sale of lands and buildings provided for the sale of the buildings separately, and one of the conditions of the sale was as follows: "The buildings will be sold, to be removed within thirty days from this date from the premises." *Held* that the purchaser of a building who also purchased the lot on which it stood, was not bound to remove the building. *Plume v. Small*, 460, 650

Vide MORTGAGE, 4, 5, 6.

SPECIFIC PERFORMANCE, 7, 8, 9.  
EXECUTORS AND ADMINISTRATORS, 5.

## W.

## WASTE.

PARTITION, 1, 4.

## WATER RIGHTS.

Vide INJUNCTION, 7, 8, 11, 18, 19.

## WILL.

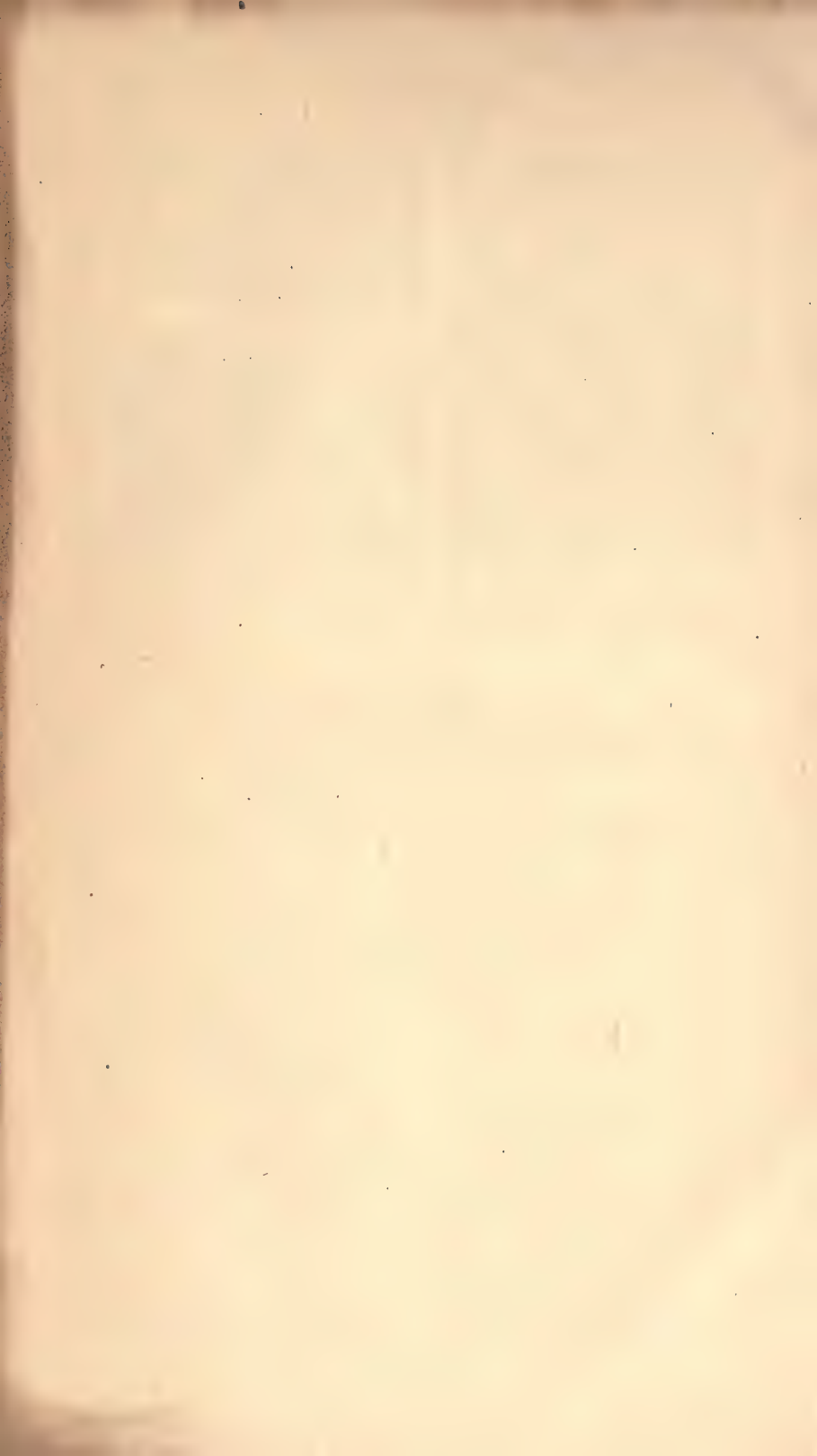
1. A, by his will, provided that his wife should have *her lawful right of dower out of his estate*; that the executor should sell and dispose of all his estate, both real and personal; that his debts be paid, that his brother John have \$500, his brother James \$100, and that the rest and residue of his estate be divided between his two sons. On bill filed by the widow, stating among other things, instructions given by A to the person who drew the will, so to draw it as to give her her lawful third of the personal property and a use of a third of his lands for life, and demurrer to the bill, it was held that the widow was entitled to her lawful third of the personal estate. *Adamson v. Ex'r of Adamson*, 349
2. *Semble.* That the situation of the estate as to the comparative amounts of realty and personalty may be shown, to influence the construction of a will. *Ib.*
3. A writing purporting to be executed by P. J. by a mark, which writing, with the names of all the persons whose names were subscribed as witnesses, and the name of P. J. were in the handwriting of one of the persons whose name was subscribed as a witness, not admitted to probate on proof that the signature of the person who wrote the will and signatures was her handwriting, and that she was dead. *In the matter of a writing purporting to be the Will of Pamela Jolly*, 456
4. The testator, S. S. O., by his will, gives to his aunt, A. P. W., \$10,000, to be paid to her as soon as practicable after his decease, or with interest from that time, and gives several other money legacies. He then makes specific bequests of furniture and other articles of personal property, and then says that he wishes his bank stock to make a part of his dear aunt's legacy, as it will give her less trouble in collecting. The will then provides thus: "Item, After all my just debts are

paid and the expense of fulfilling this my last will and testament, I give and bequeath all the remainder of my property, both real and personal, to be equally divided among my four cousins, (naming them.) Item, I wish that the house I have lately purchased of C. M. Campbell, valued at \$4000, to be part of my dear aunt's legacy, and that in the division of her portion, my Trenton Bank stock be calculated at \$40 per share, and my Easton Bank at \$30 per share." And by a codicil to his said will he gave to his said aunt, A. P. W., in fee simple, a lot of land (describing it) containing fifteen acres, and all the plate in his house, and some other articles of personal property, and also gave by the codicil three other money legacies, one

of \$200, one of \$50, and one of \$75. *Held* that the lands devised in the residuary clause of the will were not chargeable in aid of the personal estate with the payment of the legacies, but that the personal estate being insufficient to pay the legacies, they must abate. *Ex'rs of Olden v. White*, 629

5. D. G., the testator, gave the remainder of his real estate to his three children, P., the wife of C. W., C., the wife of W. S., and B. G., in fee simple, to be divided or sold as two out of the three could agree, and appointed W. S. and B. G. executors of the will. *Held* that the executors had no power to sell or to divide the real estate. *Geroe v. Winter*, 655











UC SOUTHERN REGIONAL LIBRARY FACILITY



**A** 001 028 837 1

